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Violence Against Women and the Persistence of Privacy

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American law has long embraced a fundamental distinction between the public and private spheres. As a result, certain issues important to women, including domestic violence and sexual assault, have traditionally been deemed private and therefore exempt from legal scrutiny. Feminist scholars have critiqued two versions of the dichotomy between public and private spheres that have been particularly powerful in shaping the social and legal status of women: the split between the market and the family and the split between the state and civil society. By challenging these distinctions, feminists have sought to include the issues of domestic violence and sexual assault on the nation's political and legal agenda. Their efforts resulted in the passage of the Violence Against Women Act of 1994 (VAWA), which created a federal civil rights remedy for victims of gender-motivated violence. The enactment of VAWA occurred against a backdrop of vigorous opposition by federal and state judges, who objected that it would bring "private" matters into federal court. The passage of the legislation seemed to signal the definitive arrival of violence against women in the public sphere of law and politics.

However, a series of cases has challenged the constitutionality of VAWA's civil rights provision. While most courts faced with the issue have upheld the law's constitutionality, the United States Court of Appeals for the Fourth Circuit, in its en banc opinion in the case Brzonkala v. Virginia Polytechnic Institute and State University, *found that Congress lacked constitutional authority to enact the civil rights remedy. That decision is currently under review by the United States Supreme Court. The author argues that the Fourth Circuit's opinion, which concluded that gender-based violence is too remote from both*

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In my former capacity as Senior Staff Attorney at the NOW Legal Defense and Education Fund, and as founder and chair of the National Task Force on the Violence Against Women Act from 1990 to 1994, I was a participant in some of the events described in this Article.

interstate commerce and state action to give Congress authority to act under the Commerce Clause or Section Five of the Fourteenth Amendment, rests on an unwarranted adherence to traditional notions of privacy that are damaging to women.

While much of the debate over the constitutionality of VAWA's civil rights provision has been framed in terms of federalism, the author contends that VAWA should also be examined in the context of the current controversy over gender-specific concepts of privacy. She argues that violent sex discrimination is not merely a personal, individual harm but is an injury to women as a group and to society as a whole. She concludes that the Violence Against Women Act's federal civil rights remedy for gender-motivated violence is both constitutionally sound and a necessary component of legal protections guaranteeing sex equality.

[T]he Congress has found that crimes of violence motivated by gender constitute bias crimes in violation of the victim's right to be free from discrimination on the basis of gender; . . . existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce . . . ; a Federal civil rights action as specified in this section is necessary to guarantee equal protection of the laws and to reduce the substantial adverse effects on interstate commerce caused by crimes of violence motivated by gender . . . .

—United States Congress[1]

Such a statute, we are constrained to conclude, simply cannot be reconciled with the principles of limited federal government upon which this Nation is founded. . . . This the Congress may not do, even in pursuit of the most noble of causes, lest be ceded to the Legislature a plenary power over every aspect of human affairs—no matter how private. . . ."

—United States Court of Appeals for the Fourth Circuit, en banc[2]

I. INTRODUCTION

In the words of one feminist scholar, "[t]he dichotomy between the private and the public is central to almost two centuries of feminist writing and struggle; it is, ultimately, what the feminist movement is about."[3] Since the inception of the modern feminist movement, and particularly during the past thirty years, feminist scholars and advocates have waged a vigorous attack on traditional notions of privacy.[4] As exemplified by the slogan "the personal is political," feminism[5] has sought to undermine conventional views that deem issues of

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[1] H.R. CONF. REP. NO. 103–711, at 385 (1994). These findings were part of the original text of the Violence Against Women Act and were adopted by both houses of Congress. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 967 n.10 (4th Cir. 1997), *vacated and reh'g en banc granted* (Feb. 5, 1998), *on reh'g en banc*, 169 F.3d 820 (4th Cir.) (en banc), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999).

[2] Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820, 826, 889 (4th Cir.) (en banc), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999) (striking down the civil rights provision of the Violence Against Women Act as unconstitutional).

[3] CAROLE PATEMAN, THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM AND POLITICAL THEORY 118 (1989).

[4] *See* Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 322 (1993) (describing critiques of privacy by nineteenth century and late twentieth century feminists).

[5] Feminists are not alone in challenging traditional divisions between public and private.

pressing concern to women—including household labor, sexuality, domestic violence, and sexual harassment, to name just a few—to be private and therefore beneath the notice of law and politics.[6]

Violence against women has been a particular focus of feminism's challenge to traditional formulations of private and public. Much feminist scholarship and activism has been devoted to demonstrating the central role played by male violence in creating and preserving female subordination.[7] Feminists have also extensively documented the ways in which long-accepted definitions of privacy have operated to make violence against women legally and politically invisible.[8] Specifically, feminist writers have identified and critiqued two dichotomies between public and private that have strongly influenced legal thought: the distinction between the market and the family, and the distinction between the state and civil society.[9] Both of these distinctions characterize violence against women as belonging to the private sphere, removed from the realm of law and politics. Feminists have called for resituating violence against women in the public sphere in order to gain access to a full array of legal and political weapons to combat it.[10]

A high-water mark for the feminist effort to bring violence against women into the public arena was the passage of the federal Violence Against Women Act (VAWA or the Act).[11] Enacted in 1994 after four years of intensive lobbying by women's rights groups and others,[12] the Violence Against Women Act was

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For example, the critical legal studies movement has made the public-private distinction a target of criticism. *See, e.g.*, David Kairys, *Introduction* to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1, 5 (David Kairys ed., 1990); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 286–89, 355–68 (1979); *see generally* Symposium, *The Public/Private Distinction*, 130 U. PENN. L. REV. 1289 (1982). However, the present discussion focuses on the distinctive feminist challenge to the public-private distinction.

[6] *See, e.g.*, SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 124 (1989) ("'The personal is political' is the central message of feminist critiques of the public/domestic dichotomy."); Olsen, *supra* note 4, at 322 ("An illustration of the [feminist movement's] focus on the public/private distinction is the familiar slogan 'the personal is political.'").

[7] *See infra* Part II.

[8] *See infra* Part III.

[9] *See id.*

[10] *See generally, e.g.*, Elizabeth M. Schneider, *The Violence of Privacy*, *in* THE PUBLIC NATURE OF PRIVATE VIOLENCE 36 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994).

[11] *See generally* Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (1994).

[12] On the legislative history of VAWA, see Sally Goldfarb, *The Civil Rights Remedy of the Violence Against Women Act: Legislative History, Policy Implications & Litigation*

the federal government's first attempt at a comprehensive response to the social and legal problems posed by domestic violence, rape, and other forms of gender-motivated violence.[13] The statute's seven subtitles contain dozens of provisions designed to enhance legal remedies for violence against women; improve the performance of police, prosecutors and the courts in domestic violence and rape cases; provide protection and other resources for victims; and reduce the incidence of violence against women.[14] For example, the legislation makes it a federal crime to commit domestic violence across state lines or to violate a protection order across state lines; requires states to accord full faith and credit to protection orders issued in other states; authorizes federal grants to increase the effectiveness of police, prosecutors, judges, and victim services agencies in cases of violent crime against women; provides funding for a national toll-free domestic violence hotline; increases federal financial support for battered women's shelters; reforms immigration law to protect battered immigrant women; amends the Federal Rules of Evidence to extend rape shield protection to civil as well as criminal cases; and calls for expanded research and record-keeping on violence against women.[15]

Most significantly, the Violence Against Women Act created a federal civil right to be free from crimes of violence motivated by gender.[16] VAWA's civil

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Strategy, A Panel Discussion, 4 J.L. & POL'Y 391, 392–97 (1996); Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 WIS. WOMEN'S L.J. 1 (1996).

[13] Previous federal legislation directly addressing violence against women consisted of a sparse patchwork of federal funding provisions and criminal law. *See, e.g.*, White Slave Traffic Act, 18 U.S.C. §§ 2421–2424 (1994); Family Violence Prevention and Services Act , 42 U.S.C. §§ 10401–10415 (1994).

[14] *See generally* Violence Against Women Act of 1994 (codified as amended in scattered sections of 8, 16, 18, 20, 28, and 42 U.S.C.).

[15] *See generally id.* Most of the provisions in the Violence Against Women Act refer specifically to domestic violence or sexual assault (including rape). However, the civil rights provision covers any crime of violence motivated by gender, as defined in the Act. *See infra* note 16.

[16] *See* Violence Against Women Act of 1994, tit. IV (codified at 42 U.S.C. § 13981 (1994)). The civil rights provision reads in relevant part:

> (b) All persons within the United States shall have the right to be free from crimes of violence motivated by gender....
> (c) A person... who commits a crime of violence motivated by gender... shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.
> (d) For purposes of this section—
> (1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and

rights provision allows a victim of gender-motivated violence to bring a civil lawsuit to redress the deprivation of her federal civil rights.[17] The provision permits awards of compensatory and punitive damages, injunctive and declaratory relief, and attorney's fees.[18] By designating gender-motivated violence as a federal civil rights violation, VAWA embraces the feminist characterization of violence against women as a form of sex discrimination, rather than merely a private, individual harm.

When VAWA was pending in Congress, the civil rights provision was its most controversial aspect.[19] To attain its passage, supporters of the legislation had to overcome opposition based on the longstanding attitude that violence against women is a private matter, not a suitable subject for federal judicial attention. During congressional deliberations on the Act, the controversy over the civil rights provision focused in large part on whether federal courts should concern themselves with violence committed by private individuals—particularly when such violence takes place in the context of family relationships.[20] The bill's opponents, including organizations representing the federal and state judiciaries, advanced arguments that relied heavily on traditional concepts of the split between the market and family and the split between the state and civil society.[21] In fact, one of the primary goals of supporters of the Act was to overcome centuries of assumptions about the public and private spheres that have operated to deny women full equality under the

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(2) the term "crime of violence" means—

(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of title 18, United States Code, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

42 U.S.C. §§ 13981(b)–(d) (1994).

[17] *See* 42 U.S.C. § 13981(c) (1994).

[18] *See id.*; 42 U.S.C. § 1988. For further discussion of the cause of action created by the civil rights provision, see *infra* Part IV.C.

[19] *See infra* Part IV.

[20] *See id.*

[21] *See infra* Part IV.B.

law.[22] Passage of VAWA seemed to signal a major victory for feminist efforts to bring violence against women out from behind the veil of privacy.

However, the battle over the Violence Against Women Act did not end with its enactment. In a series of court challenges, defendants have asserted that VAWA's civil rights provision is unconstitutional.[23] They have claimed that Congress lacked authority to enact the provision under both the Commerce Clause[24] and section 5 of the Fourteenth Amendment,[25] which are the two constitutional sources cited in the text of the legislation and supported by extensive legislative history.[26]

The constitutional challenges to VAWA's civil rights remedy have received a mixed response in the lower federal courts. The overwhelming majority of the courts ruling on the question have held that the civil rights remedy was a constitutionally permissible exercise of Congress's legislative powers.[27]

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[22] *See infra* Parts III, IV.A.

[23] The criminal provisions of VAWA, codified at 18 U.S.C. §§ 2261 and 2262 (1994), have also been subject to constitutional challenges. With the exception of one federal district court opinion that was later reversed on appeal, the criminal provisions have been consistently upheld under the Commerce Clause. *See generally, e.g.*, United States v. Gluzman, 154 F.3d 49 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1257 (1999); United States v. Bailey, 112 F.3d 758 (4th Cir. 1997), *cert. denied*, 522 U.S. 896 (1997); United States v. Wright, 965 F. Supp. 1307 (D. Neb.), *rev'd*, 128 F.3d 1274 (8th Cir. 1997), *cert. denied*, 523 U.S. 1053 (1998). The criminal provisions require travel across state lines as an element of the offense, thereby limiting federal jurisdiction to cases with a proven interstate nexus. This jurisdictional element has enabled courts to transcend concerns about the "private" nature of violence against women. *See, e.g.*, United States v. Lankford, 196 F.3d 563, 571 (5th Cir. 1999) ("The [criminal] provision . . . regulates the use of channels of interstate commerce . . . . As a result, that violence against a spouse is a private or noncommercial activity is of no moment."). The civil rights provision, which is the subject of this Article, contains no such jurisdictional element.

[24] U.S. CONST. art. I, § 8, cl. 3.

[25] U.S. CONST. amend. XIV, § 5.

[26] *See* 42 U.S.C. § 13981(a) (1994); H.R. CONF. REP. NO. 103-711, at 385 (1994).

[27] *See generally* Williams v. Bd. of County Comm'rs, No. 98-2845-JTM, 1999 U.S. Dist. LEXIS 13532 (D. Kan. Aug. 24, 1999); Kuhn v. Kuhn, 98-C-2395, 1999 U.S. Dist. LEXIS 11010 (N.D. Ill. July 15, 1999); Wright v. Wright, No. Civ. 98-572-A (W.D. Okla. Apr. 27, 1999); Ericson v. Syracuse Univ., 45 F. Supp. 2d 344 (S.D.N.Y. 1999); Culberson v. Doan, 65 F. Supp. 2d 701 (S.D. Ohio 1999); Doe v. Mercer, 37 F. Supp. 2d 64 (D. Mass.), *vacated and remanded on other grounds sub nom.* Doe v. Walker, 193 F.3d 42 (1st Cir. 1999); Liu v. Striuli, 36 F. Supp. 2d 452 (D.R.I. 1999); Ziegler v. Ziegler, 28 F. Supp. 2d 601 (E.D. Wash. 1998); Griffin v. City of Opa-Locka, No. 98-1550-Civ-Highsmith (S.D. Fla. Aug. 27, 1998); C.R.K. v. Martin, No. 96-1431-MLB, 1998 U.S. Dist. LEXIS 22305 (D. Kan. July 10, 1998); Timm v. DeLong, 59 F. Supp. 2d 944 (D. Neb. 1998); Mattison v. Click Corp. of Am., No. 97-CV-2736, 1998 U.S. Dist. LEXIS 720 (E.D. Pa. Jan. 27, 1998); Crisonino v. N.Y. City Hous. Auth., 985 F. Supp. 385 (S.D.N.Y. 1997); Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997); Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997); Doe v. Hartz, 970 F. Supp.

However, in an en banc decision in the case *Brzonkala v. Virginia Polytechnic Institute & State University*, the United States Court of Appeals for the Fourth Circuit—the only court of appeals to rule on the issue to date—held that Congress lacked constitutional authority to enact the civil rights provision.[28] The Supreme Court has agreed to review this decision.[29]

Taken at face value, the constitutional challenges to VAWA appear to be concerned solely with discerning the proper dimensions of Congress's powers under the Commerce Clause and section 5 of the Fourteenth Amendment. For reasons that will be explained below, both the Commerce Clause and section 5 of the Fourteenth Amendment provide Congress with ample authority to enact VAWA's civil rights remedy.[30] However, these cases are not exclusively about questions of constitutional doctrine. Beneath the surface, another phenomenon is at work. This Article will examine the connections between the constitutional challenges to VAWA and the historical tendency to view violence against women as intrinsically private and therefore undeserving of legal redress, particularly in the federal courts.

The litigation concerning the constitutionality of VAWA's civil rights remedy contains many instances of arguments based on longstanding, flawed assumptions about privacy. The litigation thus echoes the privacy-based arguments advanced by opponents of the legislation in their unsuccessful attempts to defeat the Act in Congress. Just as federal and state judicial organizations tried to persuade Congress not to pass VAWA because it would bring private, family matters into federal court, the Fourth Circuit's *Brzonkala* decision asserted that VAWA's civil rights provision would cover violence within the family, that such violence lacks adequate connections to interstate commerce and does not implicate state action, and that upholding the constitutionality of VAWA would allow federal law to usurp the entire field of domestic relations.[31]

Much of the legal struggle over VAWA's constitutionality has been framed in terms of federalism.[32] While the future of federalism is currently being

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1375 (N.D. Iowa 1997), *rev'd on other grounds*, 134 F.3d 1339 (8th Cir. 1998); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996). *But see* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820 (4th Cir.) (en banc), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999); Bergeron v. Bergeron, 48 F. Supp. 2d 628 (M.D. La. 1999).

[28] *See generally Brzonkala*, 169 F.3d 820.

[29] The Supreme Court granted certiorari in the consolidated cases of United States v. Morrison (No. 99-5) and Brzonkala v. Morrison (No. 99-29) on September 28, 1999. As this Article goes to press, a decision is expected by the end of the 1999-2000 term.

[30] *See infra* Part V.

[31] *See generally Brzonkala*, 169 F.3d 820; *infra* Part V.B.

[32] *See infra* Part V.

contested in a variety of contexts,[33] and the VAWA cases are in one sense a chapter in this larger story, it would be a mistake to see them as nothing more than this. When the issue at hand is violence against women, the federalism debate is interwoven with a debate over the continuing validity of traditional, gender-specific concepts of privacy.[34] The latter debate has a significant impact on the reasoning and outcome of the VAWA cases.

The constitutional challenges to the civil rights provision threaten to re-impose the rigid barrier between the public and private spheres that VAWA itself was designed to transcend. This Article will argue that, contrary to the assertions of some litigants and judges, finding that VAWA's civil rights remedy is constitutional is not tantamount to erasing all meaningful distinctions between the public and the private and between the roles of federal and state government. Instead, the civil rights remedy is grounded on a legitimate recognition that violence against women—although it has historically been characterized as private—has significant links to the public spheres of the market and the state. Upholding the Violence Against Women Act does not require abandoning the concept of privacy. It does require overcoming deeply ingrained, gender-specific attitudes toward privacy that obscure the extent to which harms to women are harms to society.

As background to this discussion, Part II of this Article will describe the impact of violence on women's lives and the contributions of feminist theory to an understanding of the role of violence in maintaining women's subordinate status. Because gender-motivated violence is a form of sex discrimination, a federal civil rights law to redress the resulting denial of equality is an appropriate remedy.

Part III explores the ideologies underlying the traditional view that violence against women is private and therefore beneath the notice of the law. This Part

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[33] *See, e.g.*, Condon v. Reno, 120 S. Ct. 666 (2000); Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000); Alden v. Maine, 119 S. Ct. 2240 (1999); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997); United States v. Lopez, 514 U.S. 549 (1995); United States v. Jones, 178 F.3d 479 (7th Cir.), *cert. granted*, 120 S. Ct. 494 (1999). Attention to issues of federalism has been particularly pronounced in decisions of the Fourth Circuit. *See* Litman v. George Mason Univ., 186 F.3d 544, 555 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1220 (2000) (describing "the recent intensity with which the Supreme Court and this circuit have focused on issues of federalism, separation of powers, and a limited federal government") (citations omitted); Mark Hansen, *Mid-Atlantic Drift*, A.B.A. J., Aug. 1999, at 66, 67–68 (noting Fourth Circuit's reputation for conservatism on states' rights).

[34] Indeed, as discussed below, certain arguments about federalism—specifically the resistance to having federal courts hear claims involving women or families—are themselves an outgrowth of gender-related ideas about privacy. *See infra* Part III.A.4.

analyzes two dichotomies between public and private spheres that are deeply embedded in American law: the dichotomy between the market and the family, and the dichotomy between the state and civil society. In the years leading up to introduction of the Violence Against Women Act, these two versions of the public-private split worked in concert to render violence against women doubly private and therefore largely immune from effective legal remedies. Because the federal courts adhere particularly zealously to both versions of the public-private distinction, it proved to be especially difficult to include violence against women within the scope of federal civil rights guarantees.

Part IV will examine the continuing strength of traditional notions of public and private as expressed in the rhetoric of supporters and opponents of the civil rights provision while VAWA was pending in Congress. While the bill's sponsors and those who testified in its support explicitly attacked the view that domestic violence and other forms of violence against women are private and therefore beyond the reach of federal civil rights law, the bill's opponents—including federal and state judicial organizations—relied on arguments drawn directly from the classic formulations of the public-private split. At the conclusion of this debate, VAWA was enacted in 1994, creating a federal civil right to be free from gender-motivated violence. This legislative victory marked a major departure from the customary perception that violence against women is a private matter.

Part V will turn to the constitutional challenges to VAWA. After demonstrating that challenges to the civil rights provision under both the Commerce Clause and section 5 of the Fourteenth Amendment fail on their own terms, I will trace the lineage of these challenges to age-old concepts of public and private spheres. Specifically, the Commerce Clause challenge asserts that violence against women is too remote from the public sphere of the market, while the Fourteenth Amendment challenge asserts that violence against women is too remote from the public sphere of the state. In short, the claim that VAWA's civil rights remedy is unconstitutional relies heavily on the assumption that violence against women is purely private under both versions of the public-private dichotomy. This assumption overlooks the significant public aspects of gender-motivated violence, including its effects on women's employment, women's economic status, and interstate commerce generally; its relationship to discriminatory state legal systems; and its impact on women's opportunities for equal citizenship. These public aspects distinguish gender-motivated violence from other activities that have been found to be outside the scope of the legislative powers conferred on Congress by the Commerce Clause and section 5 of the Fourteenth Amendment.

The Violence Against Women Act's civil rights remedy was designed to recognize and redress the public harm inflicted by a type of violence that has

historically been considered private. It remains to be seen how the Supreme Court will respond to the claim that the civil rights provision is unconstitutional. It is clear from past events, however, that the conventional view of violence against women as a purely private phenomenon has many adherents among the judiciary. Properly understood, gender-motivated violence has both public and private characteristics. It often arises within the family, but it affects the market. It is usually committed by private actors, but it is facilitated by state action and inaction, and it impairs the ability of women as a class to function as equal citizens. These public aspects, which have for so long been overshadowed by the emphasis on violence against women as a private injury, are in fact sufficient to sustain congressional action under both the Commerce Clause and section 5 of the Fourteenth Amendment. Only by recognizing that gender-motivated violence straddles the familiar dichotomies between market and family, between the state and civil society, and between public and private, can the Court properly weigh the constitutional challenges to the Violence Against Women Act.

II. VIOLENCE AGAINST WOMEN: A CASE OF SEX DISCRIMINATION

Violence is a pervasive and destructive force in the lives of women. Three to four million American women are battered by a spouse or intimate partner each year.[35] Two to four thousand women die annually as a result of domestic violence.[36] According to the Surgeon General, domestic violence is the single largest cause of injury to women in the United States.[37] Almost eighteen million women—one-sixth of all women in this country—have been the victim of an attempted or completed rape at some time during their lives; more than half of these women were assaulted before the age of eighteen.[38] Almost 900,000 attempted and completed rapes are perpetrated against adult women each year.[39]

Not only is crime against women widespread, but it also manifests a dramatic gender imbalance. Rape, domestic violence, and stalking are far more likely to claim women than men as victims.[40] The rate of assault for young

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[35] *See* S. REP. NO. 101-545, at 30 (1990) (citation omitted).

[36] *See id.* at 36 (citation omitted).

[37] *See id.* at 37 (citation omitted).

[38] *See* PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 2 (1998).

[39] *See id.* at 4.

[40] *See id.* at 2–3 (stating that 25% of women and 8% of men have been raped or assaulted by a current or former partner; 8% of women and 2% of men have been stalked; 1 in 6 women and 1 in 33 men have experienced attempted or completed rape). In domestic violence cases, the disparity between women's and men's rate of victimization increases as the severity of the

women has increased even while the rate for young men has declined, causing a "gender gap" of violence.[41] Moreover, the overwhelming majority of perpetrators of violent crimes against women are men.[42]

Unlike violence against men, violence against women takes place predominantly within preexisting relationships. Women are six times more likely than men to be the victim of a violent crime committed by a current or former spouse or intimate partner.[43] According to a major federal study of the subject, "[v]iolence against women is primarily partner violence."[44] Whereas men are usually attacked by strangers and acquaintances, over three-quarters of women who have been raped and/or physically assaulted during adulthood were attacked by a current or former husband or intimate partner;[45] another nine percent were victimized by a relative other than a husband.[46] A recent in-depth study of female homicides in New York City found that 63 percent of all women homicide victims were killed by an intimate partner or family member.[47] Contrary to the common myth that most women are raped by strangers,[48] the largest category of rapists is comprised of present and former husbands and boyfriends, fathers and stepfathers, and other relatives.[49] Thus, marriage, family,

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assault increases. While women are 2 to 3 times more likely than men to report that an intimate partner threw something that could hurt or pushed, grabbed, or shoved them, women are seven to fourteen times more likely to report that an intimate partner beat them up, choked or tried to drown them, threatened them with a gun, or actually used a gun on them. *See id.* at 7.

41 *See* S. REP. NO. 101-540, at 30–31 (1990) (citation omitted).

42 *See* TJADEN & THOENNES, *supra* note 38, at 8. Partner battering in lesbian relationships is a serious problem that deserves further attention. *See generally, e.g.*, Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence*, 64 GEO. WASH. L. REV. 582 (1996); Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567 (1990). However, the number of such cases is dwarfed by the number of cases of male-on-female intimate violence.

43 *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 1 (1995).

44 *See* TJADEN & THOENNES, *supra* note 38, at 2, 8.

45 *See id.*

46 *See id.* at 8.

47 *See* SUSAN A. WILT ET AL., N.Y. CITY DEP'T OF HEALTH, FEMALE HOMICIDE VICTIMS IN NEW YORK CITY 1990-1994 at 12 (1997) (observing that 49% of perpetrators were intimate partners, including current or former husband, boyfriend, or same-sex partner; 14% were other family members; 94% of perpetrators of female homicides were male).

48 *See, e.g.*, SUSAN ESTRICH, REAL RAPE 8-26 (1987); Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN'S L. REV. 979, 984–86 (1993).

49 A large national study found that 46% of women who have ever been raped were assaulted by a present or former husband, boyfriend, father or stepfather, or other family member; 22% were raped by a stranger; and 29% were raped by other nonrelatives, such as

cohabitation, and dating are the primary sources of women's exposure to violent crime.

Given the profound and disproportionate impact of violence on the lives of women, it is not surprising that feminists have made violence a target for social and legal reform. From the Declaration of Sentiments adopted at the Seneca Falls Convention of 1848, which assailed the right of husbands to "administer chastisement" by beating their wives,[50] to the founding of battered women's shelters and rape crisis centers in the 1970s,[51] to the feminist outcry over the O.J. Simpson case,[52] violence against women has often occupied a prominent place on the women's rights agenda.

Feminist theorists have devoted considerable attention to the significance of male violence as both a symptom and a cause of women's oppression.[53] In particular, Catharine MacKinnon has made the issue of violence against women

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friends and neighbors. *See* NATIONAL VICTIM CTR. & CRIME VICTIMS RESEARCH AND TREATMENT CTR., RAPE IN AMERICA: A REPORT TO THE NATION 4 (1992).

[50] *See* BARBARA ALLEN BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY 39 (2d ed. 1996) (reprinting the Declaration of Sentiments adopted at the first Women's Rights Convention held in Seneca Falls, New York, on July 19, 1848).

[51] *See, e.g.*, MARY P. KOSS ET AL., NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK, AND IN THE COMMUNITY 102–04, 217–20 (1994); SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 29–79 (1982).

[52] *See, e.g.*, Charisse Jones, *Nicole Simpson, in Death, Lifting Domestic Violence to the Forefront as a National Issue*, N.Y. TIMES, Oct. 13, 1995, at A28.

[53] The overview provided in this Article of some feminist theorists' descriptions of violence against women as a form of sex discrimination is not meant to suggest that feminists are unanimous in interpreting the relationship between violence and sex inequality. Some feminist writers do not emphasize violence in their analysis. *See, e.g.*, Linda C. McClain, *The Liberal Future of Relational Feminism: Robin West's Caring for Justice*, 24 L. & SOC. INQUIRY 477, 478 (1999) (book review) (describing "cultural" or "relational" feminist thought). Others actively dissent from the view that violent victimization is central to the female experience. *See generally* Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995) (discussing opponents of "dominance feminism," including the "feminist sex radicals" of the mid-1980s and popular writers such as Camille Paglia, Katie Roiphe, and Naomi Wolf). Some feminist scholars call for shifting the discussion of violence against women to highlight women's capacity for resistance. *See, e.g.*, *id.* at 361-76 (propounding theory of "partial agency" to explain women's resistance to violence under conditions of gender-based constraints). Still others accentuate the race- and class-specific effects of violence on women's lives. *See generally, e.g.*, Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1994).

central to her influential "dominance" theory of feminism, which postulates that gender inequality is primarily a function of the differential distribution of power between men and women.[54] Acts of male violence against women, according to MacKinnon, "express and actualize the distinctive power of men over women in society."[55] The fact that such acts are de facto permitted (despite being prohibited de jure) "confirms and extends" that power.[56] Robin West also emphasizes violence in her analysis, with special attention to the role of male violence in shaping the distinctive characteristics of female lives and experiences. She describes "the subordination of women through violence and the threat of violence" as a "profound infringement of women's liberty" that "compromises women's physical security and psychological well-being" in ways not experienced by men.[57] West contends that actual and potential victimization sharply constrain women's activities, choices, and very selves, rendering women's lives fundamentally different from—and more painful than—the lives of men.[58]

The key message of these feminist theorists is that violence against women is a form of sex discrimination. As such, it constitutes an assault on the status of women as a group.[59] In the view of Catharine MacKinnon, women are targeted for violence "because they are women: not individually or at random, but on the basis of sex, because of their membership in a group defined by gender."[60] Violence based on the victim's membership in a disadvantaged group has

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[54] *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 40–41 (1987) ("Gender is also a question of power, specifically of male supremacy and female subordination."); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 160 (1989) ("Gender is a social system that divides power.").

[55] *See* MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 54, at 127.

[56] *See* MACKINNON, FEMINISM UNMODIFIED, *supra* note 54, at 5.

[57] ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM 116–20 (1994).

[58] *See id.* at 116; *see generally* Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).

[59] The current discussion should not be taken to suggest that all crimes committed against women are necessarily or exclusively sex discriminatory. *See generally* Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520 (1992). However, there is clearly a large category of crimes in which women are victimized at least in part because they are women. The Violence Against Women Act's civil rights provision is designed to identify and address that category, by creating a civil right to be free from "crimes of violence motivated by gender." For discussion of how that phrase is defined, see *infra* Part IV.C.

[60] Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1301 (1991).

uniquely damaging effects.[61] First, discriminatory violence is particularly harmful to its victims, who suffer not only the physical and emotional injury of the crime itself but also the added psychic injury of knowing they were victimized because of their group identity.[62] Second, group-based violence serves a terroristic function, intimidating not only the individual who has been attacked but all other members of the same group who fear that they could be next. Thus, all women—including those who have not been direct victims—pay the price for violence against women in lost options, autonomy, and peace of mind.[63] And finally, group-based violence serves the broader function of reinforcing the prevailing subordination of the targeted group.[64] In this way, violence against women is an instrument of social control.

For all these reasons, feminist scholars and activists have urged that effective legal remedies be made available to redress and deter violence against women.[65] Moreover, to the extent that violence against women is not merely an injury to a particular individual but is a collective injury to women as a class, not just any type of legal remedy will do. Conventional tort and criminal remedies do not identify and respond to the discriminatory aspect of violence committed on the basis of the victim's group membership.[66] The paradigmatic legal remedy for

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[61] *See generally, e.g.*, Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320 (1994); Steven Bennet Weisburd & Brian Levin, *"On the Basis of Sex": Recognizing Gender-Based Bias Crimes*, 5 STAN. L. & POL'Y REV. 21 (1994).

[62] *See* MARY BECKER ET AL., FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 203 (1994).

[63] *See generally* MARGARET T. GORDON & STEPHANIE RIGER, THE FEMALE FEAR 1–3 (1989); *see also* MACKINNON, FEMINISM UNMODIFIED, *supra* note 54, at 7 ("[W]omen must spend an incredible amount of time, life, and energy cowed, fearful, and colonized, trying to figure out how not to be next on the list."); WEST, *supra* note 57, at 116 ("[T]he fear of the potential for sexual violence from husbands, partners, potential partners, acquaintances, or strangers leaves all women, not just abused wives and rape victims, considerably more vulnerable, more dependent, and more constrained than our brothers, fathers, sons, and husbands.").

[64] *See* MacKinnon, *supra* note 60, at 1302 ("Sexual violation symbolizes and actualizes women's subordinate social status to men.... Rape is an act of dominance over women that works systemically to maintain a gender-stratified society in which women occupy a disadvantaged status....").

[65] *See generally* Schneider, *supra* note 10.

[66] Progressive scholars have begun to explore the potential of tort and criminal law to respond to the concept of social injury or group harm. *See generally, e.g.*, Adrian Howe, *The Problem of Privatized Injuries: Feminist Strategies for Litigation*, *in* AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY 148 (Martha A. Fineman & Nancy S. Thomadsen eds., 1991); Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848. However, unlike civil rights laws prohibiting

discrimination is federal civil rights law.[67] A federal civil rights remedy is the ideal way to recognize and redress the social, rather than merely individual, harm inflicted by violence against women.[68]

Civil rights protection is not only justified by the nature of violence against women as a group-based denial of equality, but is also necessary as a precondition for enjoyment of all the other civil rights guaranteed to women. Ostensibly equal opportunities in employment,[69] education,[70] the family,[71] the community,[72] and the nation at large[73] are little more than empty promises if women must jeopardize their bodily integrity and sometimes their lives to pursue those opportunities.[74] Violence fundamentally erodes women's status as equal citizens.[75] An effective legal remedy for such violence must reinforce women's status as equal citizens, a function that only federal civil rights law can fully

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discrimination, conventional tort and criminal remedies do not vindicate the victim's and society's interest in social equality.

[67] *See Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House of Representatives Comm. on the Judiciary*, 103d Cong. 41–42 (1993) (statement of Professor Burt Neuborne, New York University School of Law) [hereinafter *1993 House Hearing*].

[68] Catharine MacKinnon notably developed this argument in connection with sexual harassment. *See generally* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

State and federal statutes imposing criminal sanctions for hate crimes are another vehicle for redressing discriminatory violence, and feminists have argued for inclusion of gender-motivated violence in such statutes. *See generally* Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN'S L. J. 123 (1999). However, a civil remedy under federal civil rights law, such as that provided by VAWA, offers unique advantages to plaintiffs. *See infra* Part IV.C.

[69] *See* Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-2 (1994).

[70] *See* Education Amendments of 1972, tit. IX, 20 U.S.C. § 1681 (1994).

[71] *See generally, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455 (1981) (requiring sex equality in legal rules governing control of property during marriage); Orr v. Orr, 440 U.S. 268 (1979) (requiring sex equality in legal rules governing alimony); Stanton v. Stanton, 421 U.S. 7 (1975) (requiring sex equality in legal rules governing child support).

[72] *See* SUSAN D. ROSS ET AL., THE RIGHTS OF WOMEN 292–96 (3d ed. 1993) (describing public accommodations laws).

[73] *See* U.S. CONST. amends. XIV, XIX.

[74] As discussed below, women are likely to become victims of violence when they attempt to exercise their independence in areas such as education and employment. *See infra* Part V.B.2.

[75] *See* WEST, *supra* note 57, at 116–20; *see generally* Andrea Brenneke, *Civil Rights Remedies for Battered Women: Axiomatic & Ignored*, 11 LAW & INEQ. J. 1 (1992); Brande Stellings, *The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship*, 28 HARV. C.R.-C.L. L. REV. 185 (1993).

perform.

Despite these considerations, for most of the history of this country, legal recourse for violence against women has been unavailable or narrowly circumscribed.[76] Even after the states began to adopt increasingly effective criminal and civil remedies for rape and domestic violence, and even after federal civil rights protections for women expanded dramatically, federal civil rights law generally offered no relief for violence against women.[77] This omission was not corrected until the Violence Against Women Act was enacted in 1994. In order to understand the longstanding exclusion of violence against women from the law in general, and from federal civil rights law in particular, it is necessary to examine the legacy of the public-private distinction. That is the subject of the following section.

III. THE PUBLIC-PRIVATE DICHOTOMIES AND FEMINIST CRITIQUES

American law has long embraced a fundamental distinction between the public and the private.[78] Feminists have identified and critiqued two versions of

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[76] *See generally* Reva B. Siegel, *"The Rule of Law": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013 (1991).

[77] *See infra* Part III.C.

[78] Although categorization is basic to human thought, *see* GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND 5–6 (1987), categories are not inevitably dichotomous. For example, some social theorists characterize society in terms of a trichotomy consisting of the public sphere, the private sphere, and societal forces that mediate between the two. *See, e.g.*, JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE 231 (Thomas Burger & Frederick Lawrence trans., 1989) (noting that "[s]tate and society penetrate each other and bring forth a middle sphere of semipublic, semiprivate relationships"); *see also* AMITAI ETZIONI, THE NEW GOLDEN RULE 142 (1996) (describing community as third pillar of society, along with market and state); ADAM B. SELIGMAN, THE IDEA OF CIVIL SOCIETY 5 (1992) (characterizing civil society as synthesis of public and private); ALAN WOLFE, WHOSE KEEPER: SOCIAL SCIENCE AND MORAL OBLIGATION 188–89 (1989) (presenting civil society as a third force deserving recognition along with market and state). Nevertheless, dichotomies in general, and the dichotomy between public and private in particular, have been uniquely pervasive and influential in American legal thought. *See, e.g.*, Abrams, *supra* note 53, at 350 (noting that the "public/private divide . . . retains considerable organizing power in legal thought"); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PENN. L. REV. 1349, 1349 (1982) ("The history of legal thought since the turn of the century is the history of the decline of a particular set of distinctions—those that, taken together, constitute the liberal way of thinking about the social world. Those distinctions [include] state/society, public/private, individual/group. . . ."). Because descriptions of the world as a series of opposing pairs so often associate men with one category and women with the opposite (usually inferior) category, such dualities have been of particular interest to feminists. *See, e.g.*, Frances Olsen, *The Sex of Law*, *in* THE POLITICS OF

this dichotomy that have been particularly powerful in shaping the social and legal status of women: the split between the market and the family and the split between the state and civil society.[79] At the height of their influence, these distinctions exercised substantial control over the development of law in a variety of areas, including violence against women.

In the decades preceding the introduction of the Violence Against Women Act in 1990, the constitutive power of both the market-family dichotomy and the state-civil dichotomy began to wane. Increasingly, the law became willing to interfere actively in the "private" family sphere, and courts began to recognize the applicability of constitutionally-based claims against private, as well as state, actors. Yet despite these signs of erosion, the dichotomies between public and private remained a strong influence on the law. Consequently, traditional notions of privacy continued to pose a formidable obstacle to obtaining federal civil rights protection from gender-motivated violence.

A. *The Market-Family Dichotomy*

1. *Overview of the Market-Family Dichotomy*

The demarcation between market and family has played a major role in prescribing and enforcing "woman's place." This version of the public-private

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LAW: A PROGRESSIVE CRITIQUE, *supra* note 5, at 453; Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N. MEX. L. REV. 613, 617-18 (1986).

[79] *See generally* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) [hereinafter *The Family and the Market*]. As Frances Olsen has pointed out, the law recognizes at least three categories of activities as "private": activities that belong to the sphere of the family rather than the marketplace; activities committed by a private actor rather than a state actor (in other words, activities that arise in the sphere of civil society rather than the sphere of the state); and activities that are included within the substantive constitutional right of privacy. Olsen, *supra* note 4, at 320–21. The third category, a full discussion of which is beyond the scope of this Article, is in large part an outgrowth of the other two. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 54, at 184–94 (critiquing constitutional right of privacy's reliance on liberal ideal of separation between the state and civil society); Barbara B. Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 997 (1992) (tracing origins of substantive constitutional privacy right to law's traditional deference to private, patriarchal family). An additional category of "private" activities is delineated by the tort of invasion of privacy, which is also beyond the scope of this Article. *See generally* Ruth Colker, *Pornography and Privacy: Towards the Development of a Group Based Theory For Sex Based Intrusions of Privacy*, 1 LAW & INEQ. J. 191 (1983); *see also* Anita L. Allen, *The Jurispolitics of Privacy*, *in* RECONSTRUCTING POLITICAL THEORY: FEMINIST PERSPECTIVES 68, 75–80 (Mary Lyndon Shanley & Uma Narayan eds., 1997).

dichotomy reached its fullest expression in the separate spheres ideology that gained prominence during the nineteenth century. With the rise of industrialization and the resulting movement of work away from the home, a cult of domesticity arose to celebrate the perceived gulf between home and marketplace.[80] According to this ideology, men are naturally suited to the public world of labor and commerce, while women are destined for the private sphere of home and hearth, where they bear and rear children and provide men with a refuge from the rigors of the outside world.[81] Justice Bradley's frequently-quoted concurrence in *Bradwell v. Illinois*[82] provides a classic statement of this view:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman.... The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.... The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.[83]

The impact of the separate spheres ideology on the law was profound and took the form of two basic precepts that interacted to deny women equality inside and outside the home.[84] First, because the private sphere of home and family was considered to be the only proper domain for women, legal rules often made it impossible for women to function independently in the public sphere, which included government and law as well as the market.[85] Second, while the marketplace was viewed as public and therefore an appropriate subject for legal intervention, the domestic sphere was idealized as a private realm in which

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[80] *See generally* Olsen, *The Family and the Market*, *supra* note 79, at 1499–1501.

[81] *See generally* NANCY F. COTT, THE BONDS OF WOMANHOOD 63–100 (1977); John Demos, *The American Family in Past Time*, *in* 2 HISTORY OF WOMEN IN THE UNITED STATES: HOUSEHOLD CONSTITUTION AND FAMILY RELATIONSHIPS 3, 13–15 (Nancy F. Cott ed., 1992); Barbara Welter, *The Cult of True Womanhood: 1820–1860*, AMER. Q. 151 (1966).

[82] 83 U.S. (16 Wall.) 130 (1872).

[83] *Id.* at 141 (Bradley, J., concurring). *Bradwell* upheld the State of Illinois's exclusion of women from admission to the bar. Seen in light of the market-family dichotomy, allowing women to practice law would presumably endanger the sanctity of the home in at least two ways: first, by polluting the domestic sphere (as embodied by the woman) with the taint of commerce; and second, by bringing the law (again, as embodied by the woman) into the home.

[84] *See generally* Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra* note 5, at 151, 151–57.

[85] *See id.*

affection, not law, would rule; therefore, the law adopted a policy of refusing to intrude in the family.[86]

One instrument for carrying out these dual purposes was the doctrine of coverture, which can be traced back at least as far as Blackstone and remained a prominent feature of family law until well into the twentieth century. The doctrine of coverture is premised on the theory of marital unity. According to Blackstone, a woman who enters marriage surrenders her legal identity to her husband and enters into the state of coverture, during which "the husband and wife are one person in law."[87] Accordingly, Blackstone concluded, a legal action between the spouses is a logical impossibility. The law cannot interpose itself between husband and wife because the two are legally considered one person.[88] The view of the family as exempt from legal interference thus arises naturally from the doctrine of coverture. Similarly, the doctrine of coverture supports the goal of confining women to the private, domestic sphere. Blackstone did not explicitly describe the family as a haven from the world of commerce—that conception did not arise until much later—but he did emphasize the married woman's inability to sue or be sued without her husband.[89] Deprived of the right to enforce contracts or sue in tort, married women were effectively excluded from independent participation in the marketplace.[90] Thus, for women, the doctrine of marital unity, embodied in the rules of coverture, made the family and the market mutually exclusive alternatives.[91]

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[86] *See id.*; Siegel, *supra* note 76, at 2142–70.

[87] 1 WILLIAM BLACKSTONE, COMMENTARIES *430.

[88] *See id.*

[89] *See id.* at *431.

[90] Justice Bradley's notorious concurrence in *Bradwell v. Illinois*, quoted in the text accompanying note 83 *supra*, relied in part on the disabilities imposed by coverture for his conclusion that women should not be permitted to practice law:

> The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband.... [A] married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counselor.

Bradwell, 83 U.S. at 141 (Bradley, J., concurring).

[91] Coverture did grant a wife the right to purchase "necessaries" at her husband's expense, giving her some access to the market as a consumer, if not as a producer. *See* BLACKSTONE, *supra* note 87, at *430. However, the cause of action to enforce the right of

In short, the market-family dichotomy supported a legal system that consigned women to a domestic sphere in which the law then refused to intervene.[92] The law's tendency to exclude women from the public sphere and ignore them in the private sphere has been reflected in numerous areas of legal doctrine. Echoing Blackstone, early common law prohibited married women from making contracts, keeping their wages, entering professions, establishing a separate domicile, and buying, selling or owning property—all of which prevented them from participating as individuals in the economic world outside the home.[93] The denial of the franchise barred women from direct participation in government. Meanwhile, the law's policy of nonintervention in the family was expressed well into the twentieth century in cases refusing to enforce the common law right of support within marriage[94] and invalidating intrafamilial contracts for financial support.[95]

2. *Implications of the Market-Family Dichotomy for Violence Against Women*

Nowhere has the law's adherence to the ideology of nonintervention in the family been more evident than in its treatment of violence against women. Doctrines like interspousal tort immunity, parental tort immunity, and the marital rape exemption in criminal law have ensured that the law historically provided little or no recourse for wife battering, incest, and marital rape.[96]

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necessaries lies with the creditor, not the wife. *See* JUDITH AREEN, FAMILY LAW 101 (4th ed. 1999).

[92] In an evocative figure of speech, a number of nineteenth century cases refusing redress for domestic violence employed the metaphor of a curtain concealing the home from public scrutiny. *See, e.g.*, State v. Oliver, 70 N.C. 60, 61–62 (1874) ("If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."); State v. Rhodes, 61 N.C. (Phil. Law) 453, 457 (1868) (noting that "however great are the evils of ill temper, quarrels, and even personal conflicts inflicting only temporary pain, they are not comparable with the evils which would result from raising the curtain, and exposing to public curiosity and criticism, the nursery and the bed chamber"); State v. Black, 60 N.C. (Win.) 262, 263 (1864) (noting that "unless some permanent injury be inflicted, or there be an excess of violence... the law will not invade the domestic forum, or go behind the curtain"). *See generally* Siegel, *supra* note 76, at 2168–69 (discussing curtain as metaphor for marital privacy).

[93] *See* Taub & Schneider, *supra* note 84, at 153.

[94] *See generally, e.g.*, McGuire v. McGuire 59 N.W.2d 336 (Neb. 1953).

[95] *See generally, e.g.*, Graham v. Graham 33 F. Supp. 936 (E.D. Mich. 1940); Borelli v. Brusseau, 16 Cal. Rptr. 2d 16 (Ct. App. 1993).

[96] *See generally, e.g.*, Joyce McConnell, *Incest as Conundrum: Judicial Discourse on Private Wrong and Public Harm*, 1 TEX. J. WOMEN & L. 143 (1992) (discussing parental tort

The denial of criminal and tort remedies for violence committed within marriage has a legal pedigree reaching back hundreds of years. As explicated by Blackstone, coverture entails the right of chastisement, according to which the husband may use "moderate correction" to discipline his wife.[97] The inability of a wife to sue her husband in tort arose directly from the rule that "the husband and wife are one person in law."[98] The marital rape exemption, which immunizes men from prosecution for raping their wives, also has roots in the venerable marital unity doctrine.[99]

Today, the doctrines of interspousal tort immunity, parental tort immunity, and the marital rape exemption have been largely but not entirely abrogated.[100] Lingering concerns about family privacy continue to shape the law of marital rape.[101] When laws do permit civil or criminal redress for domestic violence, police, prosecutors and courts are typically reluctant to enforce them, preferring to treat violence in the family as a private matter for the parties to work out themselves.[102]

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immunity); Siegel, *supra* note 76 (discussing interspousal tort immunity); Note, *To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255 (1986) (discussing marital rape exemption).

[97] BLACKSTONE, *supra* note 87, at *432. Reva Siegel has shown that during the nineteenth century, judges shifted from the right of chastisement to the ideology of family privacy as the preferred justification for judicial inaction in domestic violence cases; however, legal redress was equally likely to be denied under both rationales. *See* Siegel, *supra* note 76, at 2121–41.

[98] BLACKSTONE, *supra* note 87, at *430.

[99] *See* WEST, *supra* note 57, at 59 (tracing marital rape exemption in part to "the common law's assumption that marriage results in the unification of husband and wife and that marital rape thus constitutes rape of oneself, a legal impossibility"); Note, *To Have and to Hold*, *supra* note 96, at 1256 (discussing marital unity as a basis for marital rape exemption).

[100] In six states, the doctrine of interspousal tort immunity still bars some or all intentional tort claims between spouses. *See* 6 FAMILY LAW & PRACTICE 67A-1 to 67A-5 (Arnold H. Rutkin ed., 1999). A parent's immunity from lawsuits brought by a child still exists, in whole or in part, in 33 states. *See* Sean S. Modjarrad, Comment, Hartman v. Hartman: *Is "Parental Immunity" Recognized?*, 22 AM. J. TRIAL ADVOC. 463, 471–73 (1998). The majority of states retain some vestige of the common-law marital rape exemption by criminalizing a narrower range of sexual offenses within marriage than outside of it, subjecting sexual offenses within marriage to less severe punishments, or creating special procedural hurdles for marital rape prosecutions. *See* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. (forthcoming Oct. 2000) (citing statutes).

[101] *See, e.g.*, WEST, *supra* note 57, at 61 (identifying protection of marital privacy as an argument in support of marital rape exemption); Hasday, *supra* note 100 (citing arguments based on marital privacy advanced by modern defenders of marital rape exemption).

[102] *See generally, e.g.*, Balistreri v. Pacifica Police Dep't, 901 F.2d 696 (9th Cir. 1990); Thurman v. Torrington, 595 F. Supp. 1521 (D. Conn. 1984).

Although intrafamily violence cases provide the most fertile ground for application of family privacy considerations,[103] those considerations spill over into cases involving other types of violence against women as well. The legal system, predisposed by the separate spheres ideology to see a link between women and the domestic sphere, often treats any kind of preexisting relationship between a female victim and her assailant as if it were a family relationship, with the result that the same "hands-off" treatment applies. For example, cases of rapes committed by dates, boyfriends, acquaintances, and other nonstrangers are far less likely to result in prosecution and conviction than rapes by strangers.[104] The response to such cases, as to cases of marital rape, is conditioned by the law's reluctance to interfere in ongoing relationships.[105] Carrying this reasoning to an extreme, judges and lawyers have occasionally construed the sexual contact between a rapist and rape victim as an intimate relationship in itself; by this logic, the forced sexual contact constitutes a private interaction entitled to legal noninterference rather than a public act subject to full legal consequences.[106] A similar pattern emerges in the legal response to homicides of women. The lenient treatment traditionally available to a husband who discovered his wife in the act of adultery and murdered her in the "heat of passion" is increasingly being applied to cases of men who murdered a girlfriend, fiancée, or former wife in response to her real or imagined departure or disloyalty.[107]

In sum, by viewing not only marriage but many other kinds of relationships as domestic, private, and therefore at least partly immune from legal scrutiny, the law has failed to protect women from exactly the type of violence they are most likely to experience.

3. *Feminist Critiques of the Market-Family Dichotomy*

As we have seen, the market-family dichotomy equates the market with the public, the male, and the presence of law. In opposition to each of those

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[103] *See generally* Siegel, *supra* note 76 (analyzing impact of family privacy ideology on domestic violence law).

[104] *See generally* ESTRICH, *supra* note 48; LINDA A. FAIRSTEIN, SEXUAL VIOLENCE: OUR WAR AGAINST RAPE 129-36, 151-52 (1993); Schafran, *supra* note 48.

[105] *See* WEST, *supra* note 57, at 72 (describing "shadow resemblance" of date rape and acquaintance rape to marital rape and resulting failure to impose serious legal and social sanctions).

[106] *See, e.g.*, *infra* Part III.B.3 (discussing United States v. Lanier, 520 U.S. 259 (1997)); *infra* note 248 (discussing *In re* Judge John J. Fromer, Determination of the New York State Commission on Judicial Conduct, Oct. 25, 1984, at 2).

[107] *See generally* Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997).

categories, it equates the family with the private, the female, and the absence of law. Feminist scholars have developed a variety of critiques of these assumptions.[108]

First, the market-family dichotomy is based on myth, not on an accurate description of American society. During the early history of this country, households were intimately involved in economic production; the family was regarded as "a little commonwealth," fully integrated with the economic and political life of the community.[109] Even during the nineteenth century, when the separate spheres ideology was most widely accepted, the assertion that the market and the family are separate spheres, and that men occupy the former and women the latter, had little in common with reality. The lives of slave women, immigrant women, factory girls and pioneer women diverged radically from the image of homebound, passive women celebrated by the cult of domesticity.[110] Moreover, white middle- and upper-class women, whose circumstances permitted lives more closely approximating the ideal of the "angel of the house," frequently organized themselves into voluntary associations that worked publicly and effectively on diverse charitable, political, and legal causes.[111] Thus, although the market-family dichotomy has had considerable force as a normative concept,[112] it fails as an empirical description of current or past social arrangements.[113]

It also fails as a description of economic arrangements. Contrary to the vision of the family and the market as separate and irreconcilable, the family is an economic unit that is interdependent with larger economic forces.[114]

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[108] For a survey of feminist criticism of privacy, see generally, e.g., Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992); Olsen, *supra* note 4. As discussed further below, feminist criticism of the public-private distinction does not necessarily take the position that no such distinction is justified. *See infra* Part III.B.4.

[109] *See* JOHN DEMOS, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY (1970); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 4–5 (1985).

[110] *See* Martha Minow, *"Forming Underneath Everything That Grows:" Toward a History of Family Law*, 1985 WIS. L. REV. 819, 861–77; *see also* ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES 20-141 (1982) (describing women in the wage labor force during the nineteenth century).

[111] *See* Minow, *supra* note 110, at 877–82.

[112] *See id.* at 869–77 (describing aspirations toward conventional domesticity among nineteenth century working women).

[113] *See generally* Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9 (1988) (characterizing "separate spheres" as a trope rather than literal description).

[114] The preeminent exponent of economic analysis of the family is Nobel Prize winner Gary Becker. *See generally* GARY S. BECKER, A TREATISE ON THE FAMILY (1991). Although

Decisions about how to allocate resources and roles within the family have major economic repercussions for the individuals involved and for society as a whole.[115] Women's unpaid labor, like their paid labor, has always played an important role in the market economy.[116] Unpaid domestic labor has significant market value and substitutes for services that would otherwise have to be purchased in the marketplace.[117] The very fact that domestic labor is unpaid can be seen as a market decision, one made by and for the benefit of market actors.[118]

Just as the market and family are intertwined, so too the law is not and cannot be absent from the domestic sphere. The "private" sphere of the family has always been subject to legal regulation.[119] In fact, during the period when the separate spheres ideology was at its height, laws regulating family relationships were proliferating.[120] The family, far from being an institution that is exempt from law, is an institution that has been powerfully shaped by law.

To the extent that the law's professed policy of noninterference in the domestic sphere has been applied at all, it has not been applied even-handedly. Race and class bias are evident in selective enforcement of laws forbidding domestic violence.[121] Families that are perceived as deviant—single-mother families, families of welfare recipients, gay and lesbian families—are

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Becker's specific economic calculations are subject to criticism for their reliance on questionable assumptions about gender roles, economic analysis can nevertheless provide important insights about the family. *See generally* Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997) (examining unpaid domestic labor in economic terms).

[115] *See* Taub & Schneider, *supra* note 84, at 155–56 ("The family is the locus of fundamental economic exchanges . . . .").

[116] *See* Joyce McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 243–47 (1992).

[117] *See generally, e.g.*, Silbaugh, *supra* note 114; Gary S. Becker, *Housework: The Missing Piece of the Economic Pie*, BUSINESS WEEK, Oct. 16, 1995, at 30.

[118] *See* Olsen, *The Family and the Market*, *supra* note 79, at 1499–1500 (describing female domestic role as necessary to sustain capitalism).

[119] *See* Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1105 n.172 (1994).

[120] *See* Taub & Schneider, *supra* note 84, at 153 (discussing the Married Women's Property Acts); Siegel, *supra* note 76, at 2182 (discussing statutes restricting abortion, contraception and polygamy); *see generally* GROSSBERG, *supra* note 109 (tracing the emergence of domestic relations laws in the nineteenth century); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998) (discussing federal law on polygamy, slave marriage, and parent's control of child's labor).

[121] *See, e.g.*, Siegel, *supra* note 76, at 2134–41 (describing race and class bias in the nineteenth-century criminal justice system's response to wife-beating).

particularly likely to be the subject of direct legal control.[122]

In any event, as long as there are families and law, legal involvement in the family is inevitable. At a minimum, the existence of a legally recognized category known as "family" requires the law to assert itself to define which groups fall into that category.[123] The very conception of the family as a zone of privacy has been created and enforced by legal tools deployed in the public sphere.[124] The private sphere is not isolated from the public sphere, but is defined by and dependent on it.[125]

Furthermore, as long as law exists, it inevitably intervenes in the family, either by imposing affirmative rules or by refusing to do so. When the law fails to come to the aid of a family member seeking resolution of a dispute, it has the effect of reinforcing the power inequities of the status quo.[126] For example, an avowed policy of nonintervention in cases of domestic violence has the outcome of condoning wife battering, thereby providing men with a mechanism for exercising disproportionate power within the family.[127] Since any conceivable response (or lack thereof) from the legal system will have the result of strengthening the position of one or another participant in a family dispute, there is no meaningful possibility of "nonintervention." True legal neutrality in the domestic sphere is a logical impossibility.[128]

If, as the preceding discussion suggests, the market-family dichotomy is inaccurate, inequitably applied, and logically incoherent, what function does it

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[122] *See generally* MARTHA A. FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995).

[123] *See, e.g.*, OKIN, *supra* note 6, at 129. Because of the numerous legal and financial consequences that flow from the presence or absence of legally-recognized family relationships, there is a considerable amount of litigation over questions of who is and who is not a spouse, a parent, or other family member. *See generally* Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269 (1991).

[124] *See* Cahn, *supra* note 119, at 1112 (stating that the family represents a private haven only to the extent that public laws and decisions have created and maintained it); Siegel, *supra* note 76, at 2183 ("Judges rhetorically constructed the world 'outside' the boundaries of law in the course of invoking it as a 'reason' for the legal decisions they sought to justify.").

[125] *See* Schneider, *supra* note 10, at 38.

[126] *See generally* Taub & Schneider, *supra* note 84, at 156; Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985).

[127] *See* Schneider, *supra* note 10, at 38; Olsen, *The Family and the Market*, *supra* note 79, at 1510. As Reva Siegel has demonstrated, the adoption of privacy rhetoric during the nineteenth century as a rationale for not intervening in cases of domestic violence, far from being neutral, ensured that men would be able to continue dominating women and children in the family as they had done under the earlier common law right of chastisement. *See generally* Siegel, *supra* note 76.

[128] *See generally* Olsen, *supra* note 126.

serve? One answer is that it simultaneously fortifies and conceals unequal power relations between men and women.[129] Designating the domestic sphere as private ensures that those who lack power within that sphere will continue to experience uncertainty and insecurity within it, while those who possess power will continue to enjoy its benefits.[130] Furthermore, placing a veil of privacy over family interactions conceals from the participants and from society as a whole the public significance of those interactions—that is, the extent to which gendered patterns within the family mirror and support larger social patterns of sex inequality in society.[131] When women internalize the message that interactions in the family are personal, it becomes impossible to take political or legal action to change the family.[132] In addition, declaring the home to be the woman's sphere, and then declaring that sphere to be separate from the legal order, devalues and discredits women as a group by implying that they are not important enough to merit the concern of the legal system.[133]

The market-family dichotomy and its attendant assumptions about gender and the role of law have been extraordinarily influential, not as an empirical description nor as a coherent legal rule, but as an ideology.[134] The next subsection considers the distinctive impact of this ideology on federal law.

4. *Impact of the Market-Family Dichotomy on Federal Law*

Efforts to keep the law out of the family and the family out of the law have been especially pronounced in the federal arena. Federal courts continue to adhere to the domestic relations exception to federal diversity jurisdiction, which originated as dictum in the 1859 case of *Barber v. Barber*.[135] Although *Barber*

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[129] *See, e.g.*, Schneider, *supra* note 10, at 38–40 (noting that "the rhetoric of privacy has masked inequality and subordination" and has supported male dominance in the family); Olsen, *The Family and the Market*, *supra* note 79, at 1510 ("[T]he assertion that family affairs should be private has been made by men to prevent women and children from using state power to improve the conditions of their lives.... Furthermore, men in fact use the coercive power of the state to reinforce and consolidate their authority over wives and children.").

[130] *See* Olsen, *supra* note 4, at 325; *see also* Deborah L. Rhode, *Changing Images of the State: Feminism and the State*, 107 HARV. L. REV. 1181, 1187–88 (1994) ("Given the persistence of sex-based disparities in social, economic, and political power..., laissez-faire policies are not sex neutral.").

[131] *See* OKIN, *supra* note 6, at 124–33 (stating that unequal allocation of power within the family according to gender is a fundamental building block of gender-stratified society).

[132] Feelings of shame and unwillingness to reveal private matters are partly responsible for the vast underreporting of domestic violence. *See* Olsen, *supra* note 4, at 321 n.6.

[133] *See* Taub & Schneider, *supra* note 84, at 156.

[134] *See generally* Olsen, *supra* note 126.

[135] 62 U.S. (21 How.) 582 (1859).

actually held that the federal court *did* have diversity jurisdiction to enforce a state alimony judgment, subsequent cases relied on language in the majority opinion stating that "[w]e disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce."[136] By 1890, in *In re Burrus*, the Court stated that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."[137] This sentiment has been so frequently repeated as to become a truism.[138]

The assertion that family law belongs exclusively to the states is clearly an overstatement. By its terms, the domestic relations exception applies only to jurisdiction based on diversity of citizenship and has no relevance to other sources of federal jurisdiction.[139] Moreover, the domestic relations exception does not apply to all cases affecting the family. In its most recent decision on the subject, the Supreme Court reaffirmed the domestic relations exception with respect to establishment of divorce, alimony, and child custody decrees, but held that federal courts may hear other diversity cases involving family members, such as tort claims or suits seeking enforcement of alimony orders.[140]

In actuality, family issues have never been absent from federal law.[141] However, the Court has so thoroughly believed its own rhetoric that domestic relations are "a virtually exclusive province of the States"[142] that it has extended that observation beyond the limited class of diversity cases to which it properly applies.[143] Today, it is virtually universally assumed by both federal and state

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[136] *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 404 (1975) (citing *Barber*, 62 U.S. at 584).

[137] 136 U.S. 586, 593–94 (1890).

[138] *See* Hasday, *supra* note 120, at 1304–06.

[139] *See* Ankenbrandt v. Richards, 504 U.S. 689, 706–07 (1992); *see generally* 28 U.S.C. § 1332 (1994).

[140] *See Ankenbrandt*, 504 U.S. 689, 701–04.

[141] *See* Hasday, *supra* note 120, at 1373–86 (documenting federal court involvement in wide range of matters affecting the family); Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1721–29, 1742–44 (1991) (same). Contrary to previous historical accounts, Jill Hasday argues that legal developments during the Reconstruction period reveal that Congress viewed family matters—such as polygamy, slave marriage, and the right of a parent to control a child's labor—as appropriate subjects for federal lawmaking. *See* Hasday, *supra* note 120, at 1335–70.

[142] *See* Sosna v. Iowa, 419 U.S. 393, 404 (1975).

[143] *See generally, e.g.*, Thompson v. Thompson, 484 U.S. 174 (1988) (finding no private federal right of action under Parental Kidnapping Prevention Act); Ohio *ex rel.* Popovichi v. Agler, 280 U.S. 379 (1930) (declining federal jurisdiction over suit against foreign diplomat because claim involved alimony and divorce). *See also* Union Pacific R.R. Co. v. Bolton, 840 F. Supp. 421 (E.D. La. 1993) (declining to exercise jurisdiction over child support dispute under federal interpleader statute).

judges that "family life is governed by the law of the states, and that the federal courts 'ought' not to get involved."[144]

It is not inevitable that a federal system will contrive to exclude family issues from federal jurisdiction.[145] Underlying the federal courts' reluctance to address family-related concerns are three of the themes discussed above: the distinctions between market and family, between public and private, and between male and female.

First, federal jurisdiction is based on an assumption that market relations, but not family relations, are relevant to a federal forum.[146] The requirement of a market nexus is made explicit in the "amount in controversy" requirement for cases in which federal jurisdiction is sought on the basis of diversity of citizenship.[147] During the early twentieth century, courts and commentators reasoned that domestic relations cases must be excluded from diversity jurisdiction, because even if the parties were diverse, the nonmonetary nature of family relationships means that no amount in controversy could be established.[148] This rationale reflects the influence of the separate spheres ideology by suggesting that the domestic sphere, where love rather than money is the coin of the realm, is not a fit subject for adversary legal proceedings.[149] This portrayal of family law matters as having no monetary value is thoroughly unpersuasive, given the distinctly financial nature of alimony, child support, and

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[144] *See* Resnik, *supra* note 141, at 1698.

[145] *See* Justice David M. Steinberg, *Developing a Unified Family Court in Ontario*, 37 FAM. & CONCILIATION CTS. REV. 454, 456 (1999) (stating that in Canada, the federal and provincial governments share responsibility for family law). *See also* Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 511 (1992) ("[T]he Bill of Rights should make family law a matter within the control of the national government and not the states."); Cahn, *supra* note 119, at 1094–97 (arguing that federalism per se does not explain federal courts' reluctance to hear family law cases).

[146] *See* Resnik, *supra* note 141, at 1696–97 ("The dichotomy . . . between a commercial arena . . . and the domestic scene . . . roughly parallels assumptions about state and federal jurisdictional lines."). Federal jurisdiction has also traditionally embraced issues involving the relationship of the individual to government, discussed *infra* at Part III.B.2.

[147] *See* 28 U.S.C. § 1332 (Supp. 1997) (establishing $75,000 amount in controversy requirement).

[148] *See* De La Rama v. De La Rama, 201 U.S. 303, 307 (1906) (stating rule that diversity jurisdiction does not apply to divorce cases because husband and wife cannot be citizens of different states and divorce lacks pecuniary value); Solomon v. Solomon, 516 F.2d 1018, 1025 (3d Cir. 1975) (listing "lack of monetary value of divorce" as one of the reasons formerly offered for the domestic relations exception); Resnik, *supra* note 141, at 1746 n.337 (citing early twentieth-century treatises).

[149] *See* Siegel, *supra* note 76, at 2142–50, 2161–70.

marital property disputes.

Second, the federal courts' treatment of domestic relations issues reflects the split between the public, as exemplified by the law, and the private, as exemplified by the family. *Barber v. Barber*, the case that spawned the domestic relations exception, was decided when the separate spheres ideology was at its height.[150] As Reva Siegel has pointed out, the reasoning of *Barber* rests firmly on the doctrine of marital unity.[151] In that case, the Court accepted the husband's argument that because of marital unity, a wife cannot establish a domicile separate from that of her husband, and therefore a married couple cannot establish diversity of citizenship.[152] However, the majority recognized an exception to this rule for a wife living apart from her husband under a court order of legal separation.[153]

The legacy of family privacy is even more evident in the *Barber* dissent, which objected strenuously to the majority's holding that a wife may establish a separate domicile from her husband:

> It is not in accordance with the design and operation of a Government having its origin in causes and necessities, political, general, and external, that it should assume to regulate the domestic relations of society; should, with a kind of inquisitorial authority, enter the habitations and even into the chambers and nurseries of private families . . . .[154]

This language, with its metaphor of the law physically penetrating the private space of the home, is reminiscent of several nineteenth-century cases in which state courts refused to interfere in domestic violence because of family privacy considerations arising from the separate spheres ideology.[155] The same concerns about family privacy are visible in modern judicial discussions about federal jurisdiction.[156]

A third possible explanation for the federal courts' unwillingness to entertain cases involving the family lies in the tendency to equate the domestic sphere with women.[157] As Judith Resnik has observed, "Jurisdictional lines have not

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[150] 62 U.S. (21 How.) 582 (1859).

[151] *See* Siegel, *supra* note 76, at 2202–03.

[152] *See Barber*, 62 U.S. at 594.

[153] *See id.* at 594.

[154] *See id.* at 602 (Daniel, J., dissenting).

[155] *See supra* note 92.

[156] *See* Fernos-Lopez v. Lopez, 929 F.2d 20, 22–23 (1st Cir. 1991) (upholding exercise of federal jurisdiction over case arising from failure to pay child support because "addressing the merits of petitioner's claims would not require delving into the parties' domestic affairs").

[157] *See* Resnik, *supra* note 141, at 1696.

been drawn according to the laws of nature but by men, who today are seeking to confirm their prestige as members of the most important judiciary in the country.... Dealing with women—in and out of families...—is not how they want to frame their job."[158] Accordingly, one reason for the "federal judicial disdain for family law issues" could be gender bias.[159] Associating family related cases with women has the effect of devaluing those cases.[160] Domestic issues are generally considered not only private, but less important than other legal issues.[161] Furthermore, since women are associated with the domestic sphere, there is a risk that all "women's issues" will be viewed as family-related and therefore as not belonging in federal court.[162]

Thus, there are many parallels between the view that the family should be exempt from federal law and the view that the family should be exempt from law in general.[163] The difference, of course, is that excluding family matters from federal jurisdiction is embraced in the name of allowing the states to handle these issues, which are purported to be uniquely within the states' competence, interest, and power.[164] In this vein, the *Barber* dissent quoted above continues,

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[158] *Id.* at 1749.

[159] *See id.* at 1749, 1759.

[160] *See* Resnik, *supra* note 141, at 1749–50, 1766–67. The fact that family issues are viewed as the polar opposite of market issues, are gendered female, and are devalued is consistent with the hierarchical structure of similar dualisms such as reason/emotion, culture/nature, public/private, etc. For each such pair, one half is associated with men and is privileged, and one half is associated with women and is considered inferior or at least "other." *See* Olsen, *supra* note 78, at 453–54.

[161] On the low status of family law in general and in the eyes of federal judges in particular, see Ann Althouse, *Federalism, Untamed*, 47 VAND. L. REV. 1207, 1210 (1994); Cahn, *supra* note 119, at 1097–98, 1111–15; Minow, *supra* note 110, at 819.

[162] *See generally* Resnik, *supra* note 141 (discussing perceived absence of both women and family issues from the federal courts).

[163] *See* Cahn, *supra* note 119, at 1105 ("The rhetoric confining family law to the states is reminiscent of earlier language that confined women to the private sphere.").

[164] *See* Resnik, *supra* note 141, at 1751–57. For a critical analysis of the reasons customarily given for the domestic relations exception, including states' presumed superior expertise and competence, see Cahn, *supra* note 119, at 1087–94. For a critique of the historical argument that states have always had a monopoly on family law matters, see generally Hasday, *supra* note 120.

> The Federal tribunals can have no power to control the duties or the habits of the different members of private families in their domestic intercourse. This power belongs exclusively to the particular communities of which those families form parts, and is essential to the order and to the very existence of such communities.[165]

According to this vision, the state is the family in macrocosm, but the federal government is an entity foreign to the family and to the "communities of which those families form parts."[166] Hence, the state shares to some degree in the privacy of the family, while the federal government is unequivocally public.[167] The analogy between the privacy of the state and the privacy of the family is illustrated by the use of the term "domestic" to refer to both the internal affairs of a state and the internal affairs of a family.[168]

In short, federal courts are to state courts as market is to family, public is to private, and male is to female. As the above discussion suggests, this artificial distinction between federal and state courts with respect to family matters is subject to the same types of criticisms that feminists have leveled at other aspects of the market-family dichotomy.[169] The claim that family issues exclusively inhabit the state courts is as inaccurate as the claim that women exclusively inhabit the domestic sphere. Characterizing family claims as devoid of monetary value is as false as characterizing family life as insulated from market forces. The view that federal law does not intervene in the family is as flawed as the view that the law in general does not do so. The application of the domestic relations exception to cases arising outside of the context of diversity jurisdiction is as clear an example of overgeneralization as the application of the ideology of legal nonintervention in the family to cases of violence occurring outside the family. Much as the public legal sphere constructs the private domestic sphere, the federal courts have constructed the state courts as the "natural" setting for

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[165] Barber v. Barber, 62 U.S. (21 How.) 582, 602 (1859) (Daniel, J., dissenting).

[166] *Id.* The view of the state as a body needing protection from encroachment by federal law, much as the individual family needs protection from encroachment by law in general, has a long history. *See, e.g.*, Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (repudiating federal enforcement of the Bill of Rights against the states); Daniel J. Elazar, *Foreword: The Moral Compass of State Constitutionalism*, 30 RUTGERS L.J. 849, 854, 861-65 (1999).

[167] *See* Cahn, *supra* note 119, at 1101–02 ("There are two aspects to the Court's public/private dichotomy in family law: one between the states . . . and the family, . . . and a second between the federal and state courts.").

[168] *See, e.g.*, JOEL PRENTISS BISHOP, 1 NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION § 155, at 70 (Chicago, T.H. Flood & Co. 1891) ("The national power does not extend to the domestic affairs of the States.") (citation omitted).

[169] *See supra* Part III.A.3.

family-related cases.[170] Also, like the ideology of legal nonintervention in the family, the attempt to exclude issues concerning women and the family from federal law demeans the importance of those issues and threatens to make women and their concerns invisible in a powerful, elite setting.

B. *The State-Civil Society Dichotomy*

1. *Overview of the State-Civil Society Dichotomy*

The second version of the public-private dichotomy concerns the distinction between the state and civil society.[171] According to this formulation, the world is divided into the public realm consisting of the state and state actors, and the private realm consisting of all nongovernmental activity.[172] Seen through this lens, the family and the market both occupy the private sphere, while the public sphere is occupied exclusively by government.[173]

This classic liberal distinction has ancient roots[174] but derives most directly from Locke's view of the relationship between the individual and the state.[175] Locke envisioned an autonomous, prepolitical individual who wishes both to expand and to protect his private rights and opportunities and therefore requires a government to establish neutral, equitable laws but not to abridge his natural rights more than necessary.[176] The liberal vision thus defines citizens as

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[170] For a critique of the categorical view that states are "natural" holders of power, see generally Judith Resnik, *Afterword: Federalism's Options*, 14 YALE L. & POL'Y REV. 465 (1996). *See also* Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171, 174–75 (1995) (rejecting "essentialist" view that state and federal jurisdiction are foreordained, unchanging, and mutually exclusive).

[171] *See* Olsen, *The Family and the Market*, *supra* note 79, at 1501–02.

[172] *See* Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1672 (1997); Olsen, *The Family and the Market*, *supra* note 79, at 1501.

[173] *See* Higgins, *supra* note 172, at 1672; Olsen, *The Family and the* Market, *supra* note 79, at 1501.

[174] *See* Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 724–25 (1999) (discussing distinctions between public and private spheres in classical Greece and Rome).

[175] *See* PATEMAN, *supra* note 3, at 120–21; Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 17 (1989).

[176] *See* PATEMAN, *supra* note 3, at 122 (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT (P. Haslett ed., 2d ed. 1967)). Locke's natural rights theory stands in contrast to the positivist vision of Hobbes, according to which citizens entering into civil society relinquish all pre-existing rights and possess only those rights affirmatively granted by

individual bearers of private rights that must be protected from encroachment by government.[177] It follows that the Constitution is designed to protect the individual from the state, not to protect private individuals from each other.[178]

2. *Impact of the State-Civil Society Dichotomy on Federal Law*

Even more than the split between the market and the family, the split between the state and civil society has been a formative influence on the development of federal law. In keeping with the Lockean vision, the limits imposed by the federal Constitution are primarily addressed to government, not to private behavior.[179] The state action doctrine in federal constitutional law ensures that most constitutional rights are enforceable only against the state, its agents and acts attributable to them, not against one's fellow private citizens.[180] The state action doctrine tracks the distinction between the state and civil society.

Federal civil rights statutes, like the constitutional provisions to which they are closely tied, have typically been aimed at inequities in the public, state sphere. As they originally developed in the nineteenth century, federal civil rights laws prohibited only conduct having some direct link to state authority.[181] In key civil rights statutes, the requirement that the challenged action must be taken "under color of" state law achieves the same result as the state action requirement in constitutional law.[182] Action taken under color of state law has

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lawmaking institutions. *See* Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296, 1296–97 (1982).

[177] *See* Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237, 239 (1987).

[178] *See* Brest, *supra* note 176, at 1299–1301 (describing state action requirement as offshoot of natural rights theory).

[179] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 8–9 (2d ed. 1988).

[180] *See, e.g.*, Olsen, *supra* note 4, at 320. Among the few constitutional guarantees that do not require a showing of state action are the right to vote, right to travel, and rights established by the Thirteenth Amendment. *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 963 (13th ed. 1997). For a discussion of the relaxation of the state action requirement in some contexts, see *infra* Part III.C.

[181] *See, e.g.*, The Civil Rights Cases, 109 U.S. 3 (1883) (holding two sections of the Civil Rights Act of 1875 unconstitutional under the Fourteenth Amendment due to lack of showing of state involvement); United States v. Harris, 106 U.S. 629 (1882) (holding portion of the Civil Rights Act of 1871 unconstitutional under the Fourteenth Amendment due to lack of showing of state involvement); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952) (describing narrow interpretation of federal civil rights statutes). The expansion of federal civil rights law to include private action is discussed *infra* in Part III.C.

[182] *See, e.g.*, 42 U.S.C. § 1983 (1994).

been defined as "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[183] In the absence of a "color of law" requirement, some federal civil right statutes limit their scope to conduct that interferes with a federally-protected right; since most constitutional rights are limited to state action, the requirement of interference with a federally-protected right effectively excludes most conduct by private actors.[184]

3. *Implications of the State-Civil Society Dichotomy for Violence Against Women*

The split between the state and civil society, as embodied in federal law's state action and color of law requirements, has been a major obstacle to obtaining effective federal remedies for violence against women.[185] Federal civil rights law holds unique promise as a remedy for gender-motivated violence,[186] but because of requirements of state involvement, federal civil rights law was generally unavailable for this purpose before the Violence Against Women Act was passed.[187]

Under the most widely used civil rights statutes, relief is rarely available for violence against women. For example, 42 U.S.C. § 1983 requires a plaintiff to show that the challenged action was taken under color of state law, and 42 U.S.C. § 1985(3) requires her to show a conspiracy to deprive her of an independent, federally protected right. These elements are far from common in a typical rape

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[183] United States v. Classic, 313 U.S. 299, 326 (1941). Ordinarily, the inquiry for determining whether conduct is under color of state law is the same as the inquiry for determining whether it constitutes state action. *See* TRIBE, *supra* note 179, at 1703 n.2 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 928–32 (1982)).

[184] *See, e.g.*, United Brotherhood of Carpenters v. Scott, 463 U.S. 825 (1983) (holding that 42 U.S.C. § 1985(3) does not apply to private interference with constitutional rights that are protected only against government encroachment). *But see* Griffin v. Breckenridge, 403 U.S. 88 (1971) (holding that private conspiracy to interfere with right to travel, which is constitutionally protected against private as well as government interference, is actionable under 42 U.S.C. § 1985(3)).

[185] Although state criminal and tort law do not share federal law's emphasis on government action, state law has generally offered an inadequate response to violence against women and fails to address the discriminatory aspect of gender-motivated violence. *See supra* Parts II, III.A.2; *see infra* Part IV.A.

[186] *See supra* Part II.

[187] On the inadequacy of federal civil rights protection for gender-motivated violence before enactment of the Violence Against Women Act, see generally Brenneke, *supra* note 75, at 44–53; W.H. Hallock, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577, 592–95 (1993).

§ 1985(3) requires her to show a conspiracy to deprive her of an independent, federally protected right. These elements are far from common in a typical rape or domestic violence case. On the contrary, most of the violence committed against women occurs in the context of the family and other ongoing relationships.[188] Relatively few acts of sexual assault and battering can be directly attributed to state actors. Almost no cases involve a conspiracy to deprive the plaintiff of a right protected by federal law, particularly since most of those rights require, in turn, a showing of state action.[189] Therefore, laws designed to protect individuals from state encroachment on their rights have done little to redress the harm inflicted on women by male violence. This omission is especially noteworthy because violence is among the principal ways in which women's inequality is expressed and perpetuated.[190]

There are, of course, cases of violence against women committed by state actors.[191] Even here, however, the reluctance to view violence against women as belonging to the public sphere is evident. For example, in the case of *United States v. Lanier*,[192] the Supreme Court considered an appeal by a state judge who had been convicted under a federal criminal civil rights statute for sexually assaulting five women.[193] All of the women were with Judge Lanier on official court business when he attacked them; each of the women was a former litigant or present or potential employee over whom Judge Lanier had authority by virtue of his office.[194] The crimes occurred in the judge's chambers during working hours, and in at least one instance, he committed a sexual assault while wearing his judicial robe.[195] Thus, it would seem that the element of action taken under color of state law was established beyond any question. However, when appealing his conviction before the Supreme Court, Judge Lanier claimed that

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188 *See supra* Part II.

189 *See, e.g., United Brotherhood of Carpenters*, 463 U.S. 825.

190 *See supra* Part II.

191 For a thoughtful discussion of sexual assault by state actors, see generally Johanna R. Shargel, United States v. Lanier: *Securing the Freedom to Choose*, 39 ARIZ. L. REV. 1115 (1997).

192 520 U.S. 259 (1997) (vacating judgment below and remanding for consideration of whether defendant had fair warning that his actions violated federal criminal civil rights statute).

193 *See id.* The statute under which Judge Lanier was convicted criminalizes the willful deprivation of any rights, privileges or immunities secured by the Constitution or laws of the United States by persons acting under color of law. *See* 18 U.S.C. § 242 (1994).

194 *See Lanier*, 520 U.S. at 261.

195 *See* United States v. Lanier, 33 F.3d 639, 646–50, 653 (6th Cir. 1994), *vacated and reh'g en banc granted*, 43 F.3d 1033 (6th Cir. 1995), *rev'd*, 73 F.3d 1380 (6th Cir. 1996) (en banc), *vacated and remanded*, 520 U.S. 259 (1997).

the pretense of exercising his legitimate authority when he committed them.[196] In other words, this argument goes, violence against women is intrinsically private and can never be considered part of the public, state sphere.[197] Additionally, Judge Lanier argued that his due process rights had been violated because he was deprived of fair warning that sexually assaulting women under his control would be considered a violation of their constitutional rights.[198] Again, this argument rests on the assertion that violence against women is a subject so remote from federal constitutional rights as to make it impossible to foresee the application of the latter to the former.[199]

4. *Feminist Critiques of the State-Civil Society Dichotomy*

Although it lacks the explicit gender component of the market-family dichotomy, the dichotomy between the state and civil society has a dramatically different impact on women than on men. Major sites of women's oppression—including the nongovernmental workplace and the home—are located in the private sphere of civil society and therefore have historically not been considered appropriate subjects for protection under federal constitutional and civil rights law.[200] Gender inequality arising from disparities in private power is invisible to a system designed to protect individuals from state interference. "For women, this has meant that civil society, the domain in which women are distinctively subordinated and deprived of power, has been placed beyond reach of legal

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[196] *See* United States v. Lanier, No. 95-1717, 1997 WL 7587 at *25–*37 (Jan. 7, 1997) (transcript of oral argument of counsel for the defendant).

[197] The Supreme Court explicitly declined to address this argument. *See Lanier*, 520 U.S. at 264 n.2. However, the earlier decision of the three-judge panel below, which was vacated when the Sixth Circuit granted rehearing en banc, had specifically rejected Judge Lanier's argument that his actions were "personal pursuits." *See Lanier*, 73 F.3d at 1397 (Wellford, J., concurring in part and dissenting in part) (quoting *Lanier*, 33 F.3d at 653).

[198] *See Lanier*, 520 U.S. at 265–72.

[199] The Supreme Court remanded to the Sixth Circuit for a determination of whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal. *See Lanier*, 520 U.S. at 272. The Sixth Circuit later dismissed the appeal without a decision on the merits because Judge Lanier had become a fugitive. *See* United States v. Lanier, 123 F.3d 945, 946 (6th Cir. 1997), *cert. denied*, 523 U.S. 1011 (1998).

[200] *See* WEST, *supra* note 57, at 114–21; Becker, *supra* note 145, at 507–09; Higgins, *supra* note 172, at 1673–74 (noting that limiting constitutional constraints to state action leaves women unprotected).

guarantees. Women are oppressed socially, prior to law, without express state acts, often in intimate contexts."[201]

Some feminists have directly challenged the natural rights theory that underlies both the liberal distinction between public and private spheres and the resulting conception of the Constitution as a source of negative liberties. Catharine MacKinnon, for example, criticizes the assumption implicit in our "constitution of abstinence" that all citizens start out on an equal footing; the result of this assumption, she claims, is that those who possess freedoms like equality, liberty, privacy, and speech get to keep them without government interference, while those who lack those freedoms are not affirmatively granted them by law.[202] MacKinnon fundamentally disagrees with the belief that government best promotes freedom when it stays out of private social arrangements, a belief reflected in the state action doctrine.[203] In her opinion, leaving women to take their chances in civil society is tantamount to sending them back to an unprotected state of nature.[204] Similarly, Robin West objects to the Constitution's failure both to prohibit abuses of private power and to guarantee affirmative protections for groups that are subordinated in civil society.[205]

Some feminists have argued that the liberal construct of the private sphere is responsible not merely for failing to remedy women's subordination, but for exacerbating it.[206] By sealing off civil society in general, and the home in particular, as a private sphere where the law may not intrude, the Constitution protects the stronghold of patriarchy.[207] As Robin West puts it, "The Constitution protects the individual against abusive and violent state conduct, but not only does it not protect women against the abuse and violence that most

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201 MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 54, at 164–65.

202 *See id.* at 163.

203 *See id.* at 164.

204 *See id.* at 160.

205 *See* WEST, *supra* note 57, at 164–65.

206 *See, e.g.*, MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 54, at 194 ("[T]he legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited domestic labor. It has preserved the central institutions whereby women are deprived of identity, autonomy, control, and self-definition."); WEST, *supra* note 57, at 119 ("[T]he Constitution is not only not a shield against injustice for women, but is itself a sword of injustice pointed very markedly at women. It is part of the problem, not part of the solution."); Becker, *supra* note 145, at 508 ("[T]he Fourth Amendment does less for women than it has done for white men, who drafted it.... [T]hey added the Fourth Amendment to protect themselves from governmental intrusion.... The Fourth Amendment may have affirmatively made women worse off by giving a constitutional foundation to the notion that a 'man's home is his castle.'").

207 *See* WEST, *supra* note 57, at 119–20.

threatens them, it perversely protects the sphere of privacy and liberty within which the abuse and violence takes place."[208] Seen from this perspective, the "right to privacy is a right of men 'to be let alone' to oppress women one at a time."[209]

At the same time that it fails to address inequities in the private sphere of civil society, the state action doctrine also fails to recognize the extent to which the state is complicit in reinforcing those inequities. The boundary between state and private action is far more porous than the conventional definition of "state action" acknowledges. For example, as Robin West points out, the state contributes to the epidemic of violence against women by inadequately enforcing laws against such violence; yet this phenomenon does not meet the generally accepted definition of state action and therefore does not violate the Constitution.[210] Catharine MacKinnon argues that by forbidding violence against women de jure but permitting it de facto, the law has done little to reduce the frequency of such crimes and has made matters worse by conveying the inaccurate impression that they are rare and deviant.[211]

Having examined some feminist critiques of both the market-family dichotomy and the state-civil society dichotomy, it is important to point out that feminist scholars are not in agreement on whether to preserve or eliminate these distinctions. To say that the public-private split, in both its forms, currently promotes male dominance does not necessarily lead to the conclusion that no division between public and private is acceptable.[212] While some feminists argue for abolishing[213] or transcending[214] the public-private split, others seek to reformulate the concept of privacy as an affirmative source of women's autonomy.[215] Nevertheless, feminist critics from all of these perspectives have

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[208] *Id.* at 120–21.

[209] MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 54, at 194 (citations omitted).

[210] *See* WEST, *supra* note 57, at 119–20. Even if a state's inadequate enforcement of laws prohibiting violence against women does not rise to the level of a constitutional violation, it may be a sufficient basis for Congress to enact legislation under section 5 of the Fourteenth Amendment. *See infra* Part V.B.3.

[211] *See* MACKINNON, FEMINISM UNMODIFIED, *supra* note 54, at 5.

[212] *See* OKIN, *supra* note 6, at 127–28; Taub & Schneider, *supra* note 84, at 157.

[213] *See* MACKINNON, FEMINISM UNMODIFIED, *supra* note 54, at 93–102; MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 54, at 160–70, 184–94; Margaret A. Baldwin, *Public Women and the Feminist State*, 20 HARV. WOMEN'S L.J. 47, 69 (1997) (stating that "feminists have urged that 'there should be no aspect of our lives which we are compelled to keep private'") (citing ANNE PHILLIPS, ENGENDERING DEMOCRACY 109 (1991)).

[214] *See* Olsen, *The Family and the Market*, *supra* note 79, at 1529–78.

[215] *See, e.g.*, ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY (1988); OKIN, *supra* note 6, at 127–28; *see generally* Allen, *supra* note 174; Linda C.

joined in expressing disapproval of the public-private distinctions as they have traditionally been formulated.[216] The following subsection will examine the extent to which those traditional formulations began to break down in the years preceding the introduction of the Violence Against Women Act, and the extent to which they continued to exert influence.

C. *Erosion and Endurance of the Public-Private Dichotomies*

In the years leading up to the introduction of the Violence Against Women Act in 1990, legal reforms had significantly weakened both versions of the public-private dichotomy.

With regard to the market-family dichotomy, by the late twentieth century the law no longer prohibited women from employment, voting, contract rights, or the various other functions in the public sphere that had previously been closed to them. The conviction that the law should not actively intervene in the family was also fading. Although the law had never truly abstained from regulating the family, it began to govern family relationships more overtly and more extensively.[217] Examples include the growing body of legislation and case law governing divorce, cohabitation, child support, premarital and separation agreements, and so on.[218] In the area of violence against women, many states abrogated intrafamily tort immunities[219] and began to expand their criminal and civil remedies for domestic violence.[220]

At the same time, the strict separation between the state and civil society, as exemplified by the state action and color of law requirements, also was weakening. For the better part of a century following the Supreme Court's 1883 decision in the *Civil Rights Cases*, private rights of action under the Reconstruction-era federal civil rights statutes were available only if direct state involvement could be shown.[221] During the 1960s and 1970s, the Supreme Court

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McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 WM. & MARY L. REV. 759 (1999) [hereinafter *Reconstructive Tasks*]; Linda C. McClain, *The Poverty of Privacy?*, 3 COL. J. GENDER & L. 119 (1992); Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Schneider, *supra* note 10; Shargel, *supra* note 191.

[216] *See* sources cited *supra* in notes 213–15.

[217] *See, e.g.*, MARTHA FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 6, 9 (1991); David Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J.L. REF. 805, 805–10 (1985).

[218] *See* Chambers, *supra* note 217, at 806–09.

[219] *See supra* note 100.

[220] *See* Schneider, *supra* note 10, at 40–42.

[221] *See generally* BURKE MARSHALL, FEDERALISM AND CIVIL RIGHTS (1964); Gressman,

changed course and issued a series of decisions applying the nineteenth century civil rights statutes to private actors.[222] Meanwhile, Congress was passing an assortment of new civil rights statutes prohibiting private discrimination in areas such as employment, housing, and public accommodations.[223] These statutes were in turn upheld as legitimate exercises of Congress's constitutional powers.[224] In addition, in certain cases, the Court has interpreted the constitutional state action requirement broadly enough to include nominally private parties that were engaged in public functions or had a sufficiently close nexus with government.[225]

However, it would be a mistake to conclude that by the late twentieth century, the law no longer reflected the legacy of the public-private split. On the contrary, the two versions of the public-private dichotomy remained a powerful presence.

Long after many other manifestations of the market-family dichotomy had disappeared from the legal landscape, resistance to legal intervention in the family remained strong in cases of violence against women. Despite some reforms in state law, the legal response to violence against women continued to be inadequate. This trend is reflected in the ongoing treatment of marital rape and other types of nonstranger rape as less serious offenses than stranger rape; in attempts to force battered women into mediation of their disputes; and in the persistent reluctance of police to respond vigorously to domestic violence.[226] In apparent deference to the marital unity theory, which gives a husband ownership of all his wife's property during coverture, police and prosecutors rarely take action against batterers who destroy their wives' property.[227] Some states have

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supra note 181.

[222] *See generally, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976) (applying 42 U.S.C. § 1981 to private action); Griffin v. Breckenridge, 403 U.S. 88 (1971) (applying 42 U.S.C. § 1985(3) to private action); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (applying 42 U.S.C. § 1982 to private action).

[223] Examples include the Civil Rights Acts of 1964 and 1968, Title IX of the Education Amendments of 1972, and the Age Discrimination in Employment Act.

[224] *See generally, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding Title II of Civil Rights Act of 1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (same).

[225] *See generally, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (construing state action broadly); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (same). *But see, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) (construing state action narrowly); Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (same); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (same).

[226] *See* Schneider, *supra* note 10, at 43–46; *see also supra* Part III.A.2 and *infra* Part IV.A.

[227] *See generally* Victoria L. Lutz & Cara M. Bonomolo, *My Husband Just Trashed Our*

retained their spousal or parental tort immunity doctrines, blocking access to civil relief for intrafamily violence.[228] Moreover, before the Violence Against Women Act, virtually all the legal reforms relating to violence against women took place at the state level. In keeping with the federal courts' general reluctance to take on issues concerning women and the family, the issue of gender-motivated violence remained largely invisible in federal law.[229]

Like the division between the market and the family, the division between the state and civil society may have weakened, but it certainly did not disappear. To the present day, the state action doctrine is a controlling principle in much of federal constitutional and civil rights law.[230] As discussed earlier, the fact that most constitutional and civil rights guarantees are protected only against government interference renders them virtually useless as a source of redress for violence against women. Even in the rare instances in which state actors have played an identifiable role in facilitating intrafamily violence, the state action doctrine can act as an obstacle to achieving legal redress.[231]

The evolution of the two versions of the public-private split in the years leading up to the introduction of the Violence Against Women Act is a story of erosion and endurance. Although their hold on the law had unquestionably loosened, both dichotomies continued to exercise substantial influence.

Significantly, as the preceding discussion has shown, the impact of the two versions of the public-private split remained particularly apparent in the law concerning violence against women, and especially in the absence of a federal remedy for gender-motivated violence. Why was the lingering pull of the public-private split so deeply felt in this area of law? The explanation lies in the fact that violence against women is classified as private under *both* the market-family

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Home; What Do You Mean That's Not a Crime?, 48 S.C. L. REV. 641 (1997).

[228] *See supra* note 100.

[229] Violence based on gender is omitted from two major federal statutes addressing discriminatory violence generally: 18 U.S.C. § 245 (1994) and the Hate Crimes Statistics Act, 28 U.S.C. § 534 (1994). *See generally* Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN'S L.J. 123 (1999).

[230] *See* MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 54, at 164. The Reconstruction-era civil rights statutes that the Court has interpreted as applying to private action either do not apply to gender discrimination at all, *see, e.g.*, 42 U.S.C. §§ 1981 and 1982, or have proven to be of little use in combating gender discrimination, *see, e.g.*, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) (denying cause of action under 42 U.S.C. § 1985(3) for interference with abortion providers and patients).

[231] *See, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) (holding that a county social service agency's failure to protect a child from being beaten by his father did not constitute state action under the Due Process Clause, despite the agency's assumption of responsibility to monitor family for abuse).

dichotomy *and* the state-civil dichotomy. These two ways of classifying the world, though each was somewhat weakened by legal reform, continued to pack considerable strength when combined. Moreover, with respect to federal law—which has adhered even more zealously than state law to the dictates of the public-private dichotomies—violence against women is not merely doubly disadvantaged but is triply disadvantaged: It falls on the private side of the division between the market and family and between the state and civil society, and it also falls on the wrong side of the divide between federal and state law. These overlapping definitions of privacy, working in combination, generated powerful resistance to the inclusion of gender-motivated violence in federal civil rights law.

The synergistic effect of the two versions of the public-private split can be seen by comparing the Violence Against Women Act—a late and highly controversial[232] addition to the United States Code—to earlier federal civil rights remedies for sex discrimination. Title VII of the Civil Rights Act of 1964,[233] which prohibits sex discrimination in employment, and Title IX of the Education Amendments of 1972,[234] which prohibits sex discrimination in federally funded education programs, both create legal claims against nongovernmental actors. These claims fall on the private side of the distinction between the public state and private civil society. However, they fall on the public side of the distinction between the market and the family, because both employment and education take place in the public setting of the marketplace. Because such claims run afoul of only one version of the public-private split, they faced comparatively little resistance and became an accepted part of federal civil rights law long before the Violence Against Women Act.

The most controversial type of claim under Title VII and Title IX, namely sexual harassment, has been problematic precisely because it is subject to the perception that it implicates the private side of both versions of the public-private split. Traditionally, anything to do with sexuality has been seen as belonging to the private, domestic sphere because it concerns intimate, personal relationships.[235] Catharine MacKinnon's groundbreaking book establishing sexual harassment as a form of sex discrimination specifically rebutted this view.[236] MacKinnon's analysis demonstrated that sexual harassment entails economic as well as sexual exploitation and therefore can properly be classified

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232 *See generally infra* Part IV.

233 42 U.S.C. § 2000e-2 (1994).

234 20 U.S.C. § 1681 (1994).

235 *See generally* Sally F. Goldfarb, Public Rights for "Private" Wrongs: Sexual Harassment and the Violence Against Women Act (1999) (unpublished manuscript on file with the author).

236 *See generally* MACKINNON, *supra* note 68.

as belonging to the public, market sphere.[237] When the Supreme Court upheld causes of action for sexual harassment under Title VII[238] and Title IX,[239] it recognized that a sexual assault by a nongovernmental actor could constitute sex discrimination. What it did not do, however, was to recognize that such an assault could constitute sex discrimination if it took place in the domestic sphere rather than a market setting.

That task fell to the Violence Against Women Act. The Violence Against Women Act's civil rights provision was needed because most acts of violence against women had never been actionable under federal civil rights law unless they were committed by a state actor and/or took place in a market setting. However, the fact that VAWA would extend the reach of federal civil rights law to cover acts committed by private actors in the domestic sphere is exactly why it met such vigorous opposition. As the following section will show, much of the debate over VAWA while it was pending in Congress was framed in terms of the two traditional versions of the public-private split.

IV. THE ROLE OF THE PUBLIC-PRIVATE DICHOTOMIES IN THE DEBATE OVER THE VIOLENCE AGAINST WOMEN ACT

For much of the four years that the Violence Against Women Act was under consideration in Congress, the civil rights provision was the subject of heated controversy.[240] Both supporters and opponents of the provision agreed that creating a federal civil right to be free from acts of gender-motivated violence committed by private individuals would be a groundbreaking change in federal civil rights law.[241] Supporters and opponents disagreed, however, on whether this change was justified. Much of the debate over VAWA's civil rights provision took place in the language of the public and private spheres. The battle over the civil rights remedy was largely a contest over the continuing vitality of

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237 *See id.*

238 *See generally* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

239 *See generally* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992).

240 On VAWA's legislative history, see generally Goldfarb, *supra* note 12; Nourse, *supra* note 12.

241 *See, e.g., 1993 House Hearing, supra* note 67, at 78 (reprinting a letter dated Nov. 16, 1993, from Lyle Reid, Chief Justice of Tennessee, on behalf of the Conference of Chief Justices, to Don Edwards, Chairman of the Subcommittee on Civil and Constitutional Rights of the U.S. House of Representatives Committee on the Judiciary, stating that VAWA's civil rights provision "represents a major change in civil rights law"); Naftali BenDavid, *The Surprising Volatility of the Violence Against Women Act*, LEGAL TIMES, June 20, 1994, at 16 (quoting Senator Joseph Biden, Jr., who stated, "It's revolutionary. It's a fundamental departure from how we've dealt with empowering women."). Senator Biden was the bill's primary legislative sponsor. *See* Goldfarb, *supra* note 12, at 394.

the market-family and state-civil society distinctions, and their attendant assumptions about privacy, gender, and law.

A. *Rhetoric of Public and Private Among Supporters of VAWA*[242]

Supporters of VAWA faced the challenge of overcoming longstanding boundaries between public and private that had placed violence against women beyond the reach of federal civil rights law.

The Act in general, and the civil rights provision in particular, were designed to counteract the view, implicit in the market-family distinction, that domestic violence (and by extension, other forms of violence against women) are "private" and therefore do not deserve legal redress. The first report on the legislation by the Senate Judiciary Committee described its purpose as bringing domestic violence out from "behind closed doors."[243] In its report a year later, the Committee stated:

> Historically, crimes against women have been perceived as anything but crime—as a "family" problem, as a "private" matter, as sexual miscommunication.... Vast numbers of these crimes [rape and domestic violence] are left unreported to police or other authorities. Both literally and figuratively, these crimes remain hidden from public view.[244]

A House of Representatives subcommittee hearing on the bill was entitled "Domestic Violence: Not Just a Family Matter."[245] Similar themes were sounded by the bill's co-sponsors and by witnesses who testified in support of the legislation.[246]

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[242] In this context, the terms "supporters" and "opponents" refer to Members of Congress as well as to individuals and organizations who testified or lobbied on the legislation.

[243] *See* S. REP. NO. 101-545 at 36 (1990) (citation omitted); *see also, e.g., Domestic Violence: Not Just a Family Matter, Hearing Before the Subcomm. on Crime & Criminal Justice of the House of Reps. Comm. on the Judiciary*, 103d Cong. 35–36 (1994) [hereinafter *1994 House Hearing*] (statement of Sen. Joseph R. Biden, Jr., stating that "[f]or too long, violence in the home has not been treated as seriously as violence in the street.... Many in the criminal justice system are reluctant to become involved in what they regard as a 'family matter.'").

[244] *See* S. REP. NO. 102-197, at 37–38 (1991); *see also, e.g., Women and Violence: Hearing Before the Senate Judiciary Comm.*, 101st Cong., pt. 1, 110 (1990) [hereinafter *1990 Senate Hearing*] (statement of Sen. Joseph R. Biden, Jr., commenting that "I want to make sure that we no longer subscribe as a nation to the idea that sexual assaults that are gender-based and, in fact, the most virulent expression of bias against women in our society should be hidden.").

[245] *See generally 1994 House Hearing, supra* note 243.

[246] *See, e.g., Violence Against Women: Hearing Before the Subcomm. on Crime &*

Proponents of the legislation directly attacked the legal legacy of the market-family dichotomy as reflected in state law.[247] For example, in congressional testimony supporting the legislation, the NOW Legal Defense and Education Fund (NOW LDEF) argued that federal intervention was necessary in light of trends in the state courts that denied justice to victims of domestic violence and rape. Among the trends cited by NOW LDEF were judges who trivialized domestic violence with comments like "Let's kiss and make up and get out of my court"; criminal court judges who denied relief for domestic violence on the ground that it is "merely a domestic problem that belongs in family court"; rape immunities for husbands, cohabitants, and social companions; interspousal and parental tort immunity doctrines; the unwillingness of police to enforce orders of protection; and judicial reluctance to take nonstranger rape seriously.[248] As we

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Criminal Justice of the House of Reps. Comm. on the Judiciary, 102d Cong. 2 (1992) [hereinafter *1992 House Hearing*] (statement of Chairman Charles E. Schumer, stating that "[t]he rule of thumb now is that domestic violence cases are nothing but lovers' quarrels that are best left to be resolved without the police and the courts."); *id.* at 4 (statement of Rep. George E. Sangmeister; stating that "I want you to know that I support... the Violence Against Women Act.... We must work to change the perception that domestic violence is a family matter."); *id.* at 17 (statement of Rep. Barbara Boxer, stating that "[i]t is time that we, as a society, change our perception of domestic violence which encourages people to view it as private and insignificant."); *id.* at 24 (statement of Rep. Constance Morella, stating that "[a] problem that in the past was swept under the carpet, domestic violence is now a national disgrace of critical proportion."); *id.* at 58 (statement of Jane Doe, recounting an episode of violent abuse by her husband after which police officer told her to "go back in the house and work everything out"); *id.* at 61 (statement of William F. Schenck, county prosecutor, Greene County, Ohio, appearing on behalf of the National Organization for Victim Assistance, commenting that "we... face... the persistent myth that a man's home is his castle"); *id.* at 70 (statement of Margaret Rosenbaum, Assistant State Attorney, Miami, Fl, commenting that "many [police] officers consider domestic violence to be a private matter, something other than real crime").

[247] *See, e.g.*, SEN. REP. NO. 102-197, at 45 (1991) (criticizing state laws on parental immunity, interspousal tort immunity, and partial and complete marital rape exemptions).

[248] *See 1990 Senate Hearing, supra* note 244, at 64–67 (statement of Helen R. Neuborne, Executive Director, NOW Legal Defense Fund and Education Fund); *see also 1993 House Hearing, supra* note 66, at 8–9 (statement of Sally Goldfarb, Senior Staff Attorney, NOW Legal Defense and Education Fund). An example cited in NOW LDEF's testimony involved a New York case in which a masked stranger broke into a woman's apartment and raped her in her bed. Explaining his intention to impose a minimal sentence, the judge in the case stated, "I think it started without consent, but maybe they ended up enjoying themselves.... It was not like a rape on the street.... People hear rape and they think of the poor girl in the park dragged into the bushes. But it wasn't like that." *1990 Senate Hearing, supra* note 244, at 66 (citing *In re* Judge John J. Fromer, Determination of the New York State Commission on Judicial Conduct, Oct. 25, 1984, at 2). This judge apparently classified the act of rape as a domestic relationship, and therefore as private and less serious, simply because it took place in the victim's bed rather than on the street.

have seen, all of these trends are traceable to the split between market and family and the concomitant assumption that the law should not interfere in the domestic sphere.

VAWA's supporters also attempted to counter the view that violence against women is purely a domestic matter by proving the massive effects of such violence on interstate commerce. The Senate Judiciary Committee noted that domestic violence alone is estimated to cost society between five and ten billion dollars a year.[249] Congress heard extensive testimony on the effect of violence on women's workforce participation and productivity, income, health care expenses, consumer spending, and interstate travel.[250] Based on the evidence before it, the Senate Judiciary Committee concluded that gender-based violence bars women from full participation in the national economy.[251] According to the Committee, the experience of gender-based violence interferes with women's ability to obtain and keep employment, travel, and engage in other economic activities, and the fear of gender-motivated violence has a deterrent effect that prevents women from taking available, well-paying jobs.[252]

In addition to helping establish Congress's constitutional authority to enact the civil rights provision under the Commerce Clause,[253] this economic evidence

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[249] *See* S. REP. NO. 103-138, at 41 (1993).

[250] *See, e.g., 1993 House Hearing, supra* note 67, at 40–41, 43 (statement of Professor Burt Neuborne, New York University School of Law); *id.* at 5, 13 (statement of Sally Goldfarb, Senior Staff Attorney, NOW Legal Defense and Education Fund); *Women and Violence: Victims of the System, Hearing Before the Senate Judiciary Comm.*, 102d Cong. 92–93, 95 (1991) [hereinafter *1991 Senate Hearing*] (statement of Professor Burt Neuborne, New York University School of Law); *id.* at 239-43 (statement of Elizabeth Athanasakos, President, National Federation of Business and Professional Women, Inc.); *1990 Senate Hearing, supra* note 244, at 68–69 (statement of Helen Neuborne, Executive Director, NOW Legal Defense and Education Fund).

[251] *See* S. REP. NO. 103–138, at 54 (1993); S. REP. NO. 102-197, at 53 (1991).

[252] *See* S. REP. NO. 103–138, at 54 (1993); S. REP. NO. 102–197, at 53 (1991).

[253] Based on evidence of the economic effects of gender-motivated violence, legal experts testified before Congress that the civil rights provision was a valid exercise of Congress's power under the Commerce Clause. *See 1993 House Hearing, supra* note 67, at 43–45 (statement of Professor Burt Neuborne, New York University School of Law); *id.* at 57–61 (statement of Professor Cass Sunstein, University of Chicago Law School); *1991 Senate Hearing*, supra note 250, at 95–97 (statement of Professor Burt Neuborne, New York University School of Law); *id.* at 113–17 (statement of Professor Cass Sunstein, University of Chicago Law School). In the Conference Committee report that Congress adopted when it passed the Violence Against Women Act, Congress found that:

was a direct challenge to the conventional view that domestic matters, including domestic violence, have no impact on the public sphere of the marketplace. By indicating that violence against women has a prominent place in the market, VAWA's supporters sought to show that violence against women also deserves to have a prominent place in the law.

In another indication of the relevance of the market-family split to the debate over VAWA, the bill's supporters repeatedly emphasized that the civil rights provision would not create a federal domestic relations law.[254] This strategy was necessitated by two ways in which the market-family dichotomy is reflected in federal law: first, the federal judiciary's staunch resistance to hearing family-related cases, and second, the tendency to assume that all cases concerning women are really about the family.[255]

Another way in which supporters of the civil rights remedy positioned violence against women as a public issue was by emphasizing that gender-motivated violence is a group-based denial of equality.[256] Patricia Ireland, president of the National Organization for Women, testified:

> [C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting... business... in interstate commerce; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

H.R. CONF. REP. NO. 103-711, at 385 (1994). For further discussion of Congress's authority to enact VAWA's civil rights provision under the Commerce Clause, see *infra* Parts V.A, V.B.2.

[254] *See, e.g., 1993 House Hearing, supra* note 67, at 104–05 (statement of James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice); *1992 House Hearing, supra* note 246, at 10 (statement of Sen. Joseph R. Biden, Jr.); S. REP. NO. 102-197, at 48 (1991). The Violence Against Women Act specifies that it does not confer federal jurisdiction over any state law claim seeking the establishment of a divorce, alimony, marital property, or child custody decree. *See* 42 U.S.C. § 13981(e)(4) (1994).

[255] *See generally supra* Part III.A.4, and *infra* Part IV.B.

[256] *See, e.g., 1994 House Hearing, supra* note 243, at 39 (statement of Sen. Joseph R. Biden, Jr., stating that "[o]nly when this violence is seen as a public injustice, rather than a private misfortune, will we truly begin to confront this problem."); *1990 Senate Hearing, supra* note 244, at 2 (statement of Sen. Joseph R. Biden, Jr., describing gender-motivated violence as "violent sexism" and analogizing it to sex discrimination in employment); S. REP. NO. 102-197, at 35 (1991) (noting that "the bill declares—for the first time—that gender-motivated crimes are a violation of the victim's civil rights, a proposal that sends a powerful message condemning crimes that not only ravage individuals but systematically deprive women of equal rights under law").

> It's very clear to all of us who see the bombings of NAACP offices, the vandalizing of synagogues, that these are more clearly political and public violence. But because so much of the violence against women is behind closed doors, is . . . private violence, . . . the political aspect of it has often been ignored. It's not just a problem that an individual woman faces . . . but rather a systemic problem that all women face.[257]

Echoing this analysis, the Senate Judiciary Committee described violence motivated by gender as "not merely an individual crime or a personal injury, but . . . a form of discrimination," "an assault on a publicly shared ideal of equality."[258] The Committee characterized the civil rights provision as "an effective anti-discrimination remedy for violently expressed prejudice."[259]

In addition to highlighting the discriminatory impact of individual acts of gender-motivated violence, the bill's supporters also emphasized the discrimination inherent in the state legal systems' responses to such violence. Testimony of individual witnesses and committee reports repeatedly stressed the fact that states have condoned violence against women through legal doctrines that treat crimes against women less seriously than crimes against men; through inadequate enforcement of existing laws by police, prosecutors, and judges; and through overtly discriminatory treatment of female crime victims.[260] Thus, the bill's supporters identified causes of violence against women in the public sphere of the state, not merely in the private sphere of civil society. After reviewing a

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[257] *1993 House Hearing*, *supra* note 67, at 114 (statement of Patricia Ireland, President, National Organization for Women); *see also 1990 Senate Hearing*, *supra* note 244, at 62 (statement of Helen Neuborne, Executive Director, NOW Legal Defense and Education Fund, stating that "[b]ecause of gender-based violence, American women and girls are relegated to a form of second-class citizenship").

[258] S. REP. NO. 101-545, at 40, 43 (1990) (quoting statement of Helen Neuborne). In keeping with its emphasis on the discriminatory aspect of violence against women, VAWA's civil rights remedy does not cover all crimes committed against women; rather, it requires proof of gender motivation in each case. *See generally infra* Part IV.C.

[259] *See* S. REP. NO. 102-197, at 42 (1991). A number of witnesses and committee reports analogized gender-based attacks to hate crimes based on race or religion. *See, e.g.*, *1993 House Hearing*, *supra* note 67, at 113 (statement of Patricia Ireland, President, National Organization for Women); *1991 Senate Hearing*, *supra* note 250, at 48–49 (statement of Sen. Joseph R. Biden, Jr.); S. REP. NO. 103-138, at 48-49 (1993); S. REP NO. 101-545, at 41 (1990).

[260] *See, e.g.*, *1993 House Hearing*, *supra* note 67, at 8–9 (statement of Sally Goldfarb, Senior Staff Attorney, NOW Legal Defense and Education Fund); S. REP. NO. 103-138, at 49 (1993); H.R. REP. NO. 103-395, at 27–28 (1993); S. REP. NO. 102-197, at 33–35, 43–48 (1991); S. REP. NO. 101-545, at 41 (1990); *see also* S. REP. NO. 103-138, at 55 (1993) (quoting statement of Professor Cass Sunstein, University of Chicago Law School, stating that "the criminal justice system is not providing equal protection of the laws [to] women in the classic sense").

series of reports from official state task forces on gender bias in the courts, the Senate Judiciary Committee concluded that there was "overwhelming evidence that gender bias permeates the court system and that women are most often its victims."[261]

The legal implications of identifying violence against women as an issue of public equality, rather than a private, individual injury, are significant. Legal experts testified before Congress that the failure of state law to provide effective legal remedies for violence against women, together with overt gender bias in the state justice systems, provided a valid basis for Congress to enact the civil rights remedy under section 5 of the Fourteenth Amendment.[262] By designating gender-motivated violence as a form of discrimination, VAWA's supporters were able to present the civil rights remedy as an antidiscrimination measure that builds on, and is a logical extension of, existing federal civil rights laws.[263]

B. *Rhetoric of Public and Private Among Opponents of VAWA*

While VAWA was pending in Congress, much of the opposition to the civil rights provision was premised on a group of attitudes associated with orthodox adherence to the public-private distinctions: the idealization of family privacy and legal nonintervention in the family; the tendency to equate women with the domestic sphere; the belief that matters involving the family belong only in state court; and resistance to the recent trend of applying federal constitutional and

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[261] S. REP. NO. 103-138, at 49 (1993) (quoting Lynn Hecht Schafran, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, TRIAL, Feb. 1990, at 28).

[262] *See 1993 House Hearing*, *supra* note 67, at 45–47 (statement of Professor Burt Neuborne, New York University School of Law); *id.* at 61–67 (statement of Professor Cass Sunstein, University of Chicago Law School); *1991 Senate Hearing*, *supra* note 250, at 97-99 (statement of Professor Burt Neuborne, New York University School of Law); *id.* at 117-23 (statement of Professor Cass Sunstein, University of Chicago Law School). For further discussion of Congress's authority to enact VAWA's civil rights provision under section 5 of the Fourteenth Amendment, see *infra* Parts V.A, V.B.3.

[263] *See, e.g.*, *1993 House Hearing*, *supra* note 67, at 10–11 (statement of Sally Goldfarb, Senior Staff Attorney, NOW Legal Defense and Education Fund, stating that VAWA "builds on and complements existing federal civil rights laws"); *id.* at 98, 105 (statement of James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, stating that VAWA "builds on the foundation laid by existing civil rights laws"); H.R. CONF. REP. NO. 103-711, at 385 (1994) (noting that "current law provides a civil rights remedy for gender crimes committed in the workplace, but not for crimes of violence motivated by gender committed on the street or in the home"); S. REP. NO. 103-138, at 51–53 (1993) (stating that VAWA's civil rights remedy is "a logical extension" of the nation's 120-year history of using federal civil rights laws to fight discriminatory violence, and that VAWA's "definition of gender-motivated crime is based on title VII"); S. REP. NO. 102-197, at 62 (1991) (noting that the civil rights provision is "[m]odeled on [42 U.S.C.] sections 1981, 1983, and 1985(3)").

civil rights to nonstate actors. The clearest expressions of these attitudes came from the judiciary, who lobbied actively against the bill. An examination of statements made by VAWA's opponents reveals the lingering influence of traditional conceptions of public and private.

In a particularly striking evocation of the ideology of legal nonintervention in the family, the Conference of Chief Justices, which represents the state judiciary, criticized VAWA's civil rights provision on the ground that it would conflict with the marital rape exemption.[264] Similarly, lawyer Bruce Fein, who testified against the legislation, specifically objected to the fact that VAWA would interfere with a state's choice not to criminalize spousal rape—a choice that, according to Fein, states should be free to make based on "local customs."[265] Although the marital rape exemption survives,[266] it is rare to see it openly defended;[267] the fact that VAWA's opponents did so reveals the depth of their immersion in the world view of the market-family split.

Much of the opposition to the civil rights provision took the form of assertions that federal courts should not interfere in the private, domestic sphere.[268] Chief Justice Rehnquist, for example, used his 1991 Year-End Report on the Federal Judiciary to urge Congress not to pass the Violence Against Women Act because it would create an influx of "domestic relations disputes" into the federal courts.[269] Similarly, the Conference of Chief Justices opposed the statute on the basis that it would constitute an unwarranted federal intrusion into the domain of the state courts.[270] Like its state counterpart, the Judicial Conference of the United States, representing the federal judiciary, adopted a

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[264] *See 1993 House Hearing, supra* note 67, at 81 (statement by The Honorable Vincent L. McKusick, President, Conference of Chief Justices, citing 18 U.S.C. § 2243(c)(2) (1994) (establishing marriage as a defense to federal crime of sexual abuse of minor or ward)); *1991 Senate Hearing, supra* note 250, at 316 (same).

[265] *See 1993 House Hearing, supra* note 67, at 27–28 (statement of Bruce Fein, attorney).

[266] *See supra* note 100.

[267] *See* Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 217–20 (1995) (claiming that privacy doctrine has not been used by modern courts to defend marital rape).

[268] *See* Nourse, *supra* note 12, at 13 ("[S]tate and federal judges mounted a campaign to warn that the bill would 'flood the federal courts' and deprive state courts of their traditional jurisdiction.").

[269] William H. Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH, Jan. 1992, at 1, 3 [hereinafter *1991 Year-End Report*]; *see also* William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1657, 1660 (1992) (criticizing VAWA for potential to "create needless friction and duplication among the state and federal systems").

[270] *1993 House Hearing, supra* note 67, at 83–84 (statement of The Honorable Vincent L. McKusick, President, Conference of Chief Justices).

resolution in 1991 opposing VAWA's civil rights provision because of "its potential to disrupt traditional jurisdictional boundaries between the federal and state courts."[271]

Implicit in these objections are the familiar assumptions that all violence against women is "domestic" and that domestic issues do not belong in federal court.[272] In fact, VAWA's scope encompasses any "crime of violence motivated by gender"; the fact that an act of violence took place in the home or among family members is neither necessary nor sufficient to make out a cause of action.[273] Viewed objectively, VAWA is not a domestic relations law. It explicitly does not confer pendent jurisdiction over state law claims seeking establishment of divorce, alimony, marital property, and custody decrees.[274] VAWA is a civil rights law, modeled on other federal civil laws.[275] Inasmuch as VAWA is designed to remedy discrimination—whether it takes place in the family or elsewhere—it appropriately belongs in federal court, the traditional forum for civil rights relief.[276]

Both the Conference of Chief Justices and the Judicial Conference of the United States expressed concern that women would use VAWA as a bargaining chip to extort larger settlements in divorces.[277] The President of the Conference

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[271] *See 1993 House Hearing, supra* note 67, at 70 (letter from Judge Stanley Marcus on behalf of the Judicial Conference to Don Edwards, Chairman, Subcommittee on Civil and Constitutional Rights). Unlike the Conference of Chief Justices and the Judicial Conference of the United States, the National Association of Women Judges endorsed VAWA, including the civil rights provision. *See id.* at 30–32. In addition, 41 state attorneys general signed a letter endorsing VAWA, including its civil rights provision, and calling for "federal leadership" on the issue of violence against women. *See id.* at 34–36; *see also 1991 Senate Hearing, supra* note 250, at 37–38 (reprinting unanimous resolution of National Association of Attorneys General endorsing VAWA, including its civil rights title).

[272] *See, e.g., 1993 House Hearing, supra* note 67, at 83 (statement of The Honorable Vincent L. McKusick, President, Conference of Chief Justices, stating that "spousal and sexual violence and all legal issues involved in domestic relations historically have been governed by state criminal and civil law"); Letter from The Honorable Vincent L. McCusick, President, Conference of Chief Justices, to Senator Joseph R. Biden, Jr. 2 (Feb. 22, 1991) (on file with the author) (describing the civil rights provision as a "direct federal intervention into the tangled and tragic cases involving family breakdown and violence").

[273] *See* 42 U.S.C. § 13981(c) (1994).

[274] *See* 42 U.S.C. § 13981(e)(4) (1994).

[275] *See supra* note 263 and accompanying text.

[276] *See* Letter from Senator Joseph R. Biden, Jr., to Delegates of the American Bar Association 1 (Aug. 10, 1992) (unpublished document on file with the author) (arguing that VAWA does not "'federalize[ ]' state law claims" any more than existing federal remedies for lynchings, race-based bombings of churches, or murders of civil rights workers).

[277] *See 1993 House Hearing, supra* note 67, at 75, 80. To this argument, Senator Biden responded, "It is outrageous to assume that women as a group are prone to file frivolous

of Chief Justices complained that VAWA "would add a new count to many if not most divorce and other domestic relations cases, further complicating their adjudication and making them more difficult to settle peacefully."[278] This emphasis on "peaceful[ ]" settlement of domestic relations cases echoes nineteenth-century cases arguing against judicial intrusion in the marriage relationship.[279] Settlement, like mediation, is a way to keep family disputes out of court even when legal recourse is technically available.

In addition to raising arguments based on the split between market and family and corresponding assumptions about federal and state jurisdiction, the Conference of Chief Justices also invoked the split between the state and civil society. The Conference objected that VAWA's civil rights provision "appears to eliminate, or at least vitiate, the 'state action' requirement for civil rights litigation."[280] Because VAWA's scope is not limited to actions taken under color of state law, the Conference argued, it is inconsistent with existing federal civil rights laws.[281] In other words, civil rights statutes can protect private individuals only from the state, not from each other. As noted earlier, the preceding three decades had seen a proliferation of federal cases and statutes prohibiting discrimination by private actors.[282] The fact that the organization representing the leading state jurists in the country argued repeatedly and forcefully that federal civil rights laws apply exclusively to state actors, without acknowledging the growing number of exceptions to that general rule, demonstrates the lingering power of the state-civil society dichotomy over the judicial imagination.

C. *The Outcome of the Debate: The Significance of Enactment of the Violence Against Women Act*

Ultimately, the Judicial Conference of the United States was satisfied with the inclusion of language limiting the scope of VAWA's civil rights remedy and withdrew its opposition to the legislation, adopting a position of neutrality

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suits.... The suggestion that [they do so] plays upon the very gender-biased stereotypes that my legislation was intended, in part, to dispel." Letter from Senator Joseph R. Biden, Jr. to Delegates of the American Bar Association, *supra* note 276, at 2.

278 Letter from The Honorable Vincent L. McCusick, President, Conference of Chief Justices, to Senator Joseph R. Biden, Jr., *supra* note 272, at 1.

279 *See supra* Part III.A.2.

280 *1993 House Hearing*, *supra* note 67, at 82 (statement by The Honorable Vincent L. McCusick, President, Conference of Chief Justices) (emphasis omitted); *1991 Senate Hearing*, *supra note* 250, at 317 (same).

281 *See 1993 House Hearing*, *supra* note 67, at 78.

282 *See supra* Part III.C; *see also 1993 House Hearing*, *supra* note 67, at 45–47 (statement of Professor Burt Neuborne, New York University School of Law).

instead.[283] In 1994, the Violence Against Women Act, including the civil rights remedy, was passed by Congress and signed into law.[284]

The Violence Against Women Act declares for the first time that a "crime of violence motivated by gender" is discriminatory and violates the victim's civil rights under federal law.[285] The statute defines the phrase "motivated by gender" as an act committed "because of gender or on the basis of gender and due, at least in part, to an animus based on the victim's gender."[286] The term "crime of violence" includes acts that federal or state law would consider a felony against a person, or a felony against property that presents a serious risk of physical injury to another person.[287] The definition of "crime of violence" also includes acts that would constitute such a felony but for the relationship between the perpetrator and the victim.[288] Although the legislative history of the civil rights provision focused primarily on stranger and nonstranger rape, domestic violence, and murder of women, the statute is gender neutral and permits a suit against the perpetrator of any "crime of violence motivated by gender" as defined in the Act. VAWA's civil rights provision creates a private, civil right of action and allows awards of compensatory and punitive damages, injunctive and declaratory relief, and attorney's fees.[289] The plaintiff is not required to press criminal charges or obtain a criminal conviction in order to pursue the civil rights remedy against the perpetrator.[290]

The passage of this legislation had great practical and symbolic value. On a practical level, VAWA offers a remedy that in some cases is the only source of legal redress for violence against women and in many others is vastly superior to other available legal options. VAWA avoids the restrictive effects of state tort

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[283] *See 1993 House Hearing*, *supra* note 67, at 37, 70–73. Among the changes to the statute that were cited approvingly by the Judicial Conference were a requirement of proof of animus; restrictions on the types of crimes covered; denial of supplemental federal jurisdiction over state law claims seeking establishment of divorce, alimony, marital property, or child custody decrees; and a prohibition on removal to federal court of any VAWA civil rights action filed in state court. *See id.* at 71. The Conference of Chief Justices maintained its opposition to the civil rights remedy. *See id.* at 77–84.

[284] *See* Nourse, *supra* note 12, at 33–36.

[285] 42 U.S.C. § 13981(b) (1994).

[286] 42 U.S.C. § 13981(d)(1) (1994). For discussion of applications of the "motivated by gender" standard, see generally Goldfarb, *supra* note 12, at 397–98; Goldscheid, *supra* note 68; Nourse, *supra* note 12, at 29–33.

[287] 42 U.S.C. § 13981(d)(2)(A) (1994).

[288] 42 U.S.C. § 13981(d)(2)(B) (1994).

[289] 42 U.S.C. § 13981(c) (1994); 42 U.S.C. § 1988(b) (1994 & Supp. III 1997).

[290] 42 U.S.C. § 13981(e)(2) (1994).

immunities, marital rape exemptions, and unduly short statutes of limitations.[291] Unlike most previous federal civil rights laws, VAWA does not require a showing of action taken under color of state law[292] or proof of a conspiracy to deny the plaintiff an independent, federally protected right.[293] VAWA civil rights claims brought in federal court[294] are covered by Rule 412 of the Federal Rules of Evidence which, as amended elsewhere in VAWA, extends rape shield protections to civil cases;[295] few states offer such protections.[296] For cases of gender-motivated violence in the workplace, VAWA provides a desirable alternative to Title VII because it permits unlimited awards of compensatory and punitive damages; has a far longer statute of limitations; does not require exhaustion of administrative remedies; and applies to workplaces with fewer than fifteen employees.[297] As a civil rather than criminal action, VAWA empowers women by placing control over the litigation in their own hands and sidesteps the obstacles of gender bias among police and prosecutors. Also, unlike criminal cases, VAWA permits plaintiffs to collect money damages and applies the preponderance of the evidence standard rather than the more onerous standard of beyond a reasonable doubt.[298]

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[291] *See* 28 U.S.C. § 1658 (1994) (establishing a four year federal statute of limitations); *see also* Grace v. Nissan, 76 F. Supp. 2d 1083, 1090 (D. Or. 1999) (applying a four year statute of limitations). Some federal courts have erroneously applied state statutes of limitations to VAWA civil rights claims. *See generally* Santiago v. Alonso, 66 F. Supp. 2d 269 (D.P.R. 1999); Wesley v. Don Stein Buick, Inc., 42 F. Supp. 2d 1192 (D. Kan. 1999); Ericson v. Syracuse Univ., 35 F. Supp. 2d 326 (S.D.N.Y. 1999).

[292] *See* 42 U.S.C. § 1983 (1994 & Supp. III 1997).

[293] *See* 42 U.S.C. § 1985(3) (1994). Unlike section 1985(3), which merely prohibits interference with existing federal rights (most of which require a showing of state action), VAWA creates a new, substantive federal right to be free from gender-motivated violence and applies that right equally to violence committed by state actors and private actors. *See 1993 House Hearing*, *supra* note 67, at 46–47 (statement of Professor Burt Neuborne, New York University School of Law, distinguishing VAWA from section 1985(3)); S. REP. NO. 103-138, at 64 (1993) (stating that civil rights remedy applies equally to state and private action).

[294] The federal and state courts have concurrent jurisdiction over VAWA civil rights claims. *See* 42 U.S.C. § 13981(e)(3) (1994). For plaintiffs, federal courts may offer a variety of advantages stemming from differing judicial selection techniques, insulation from political pressure, and superior resources. *See generally* Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797 (1995).

[295] Violence Against Women Act, Pub. L. No. 103-322 § 40141, 108 Stat. 1918 (1994) (codified at FED. R. EVID. 412).

[296] *See* S. REP. NO. 102-197, at 46 (1991).

[297] *See generally* Andrea Brenneke, *Title VII*, *in* VIOLENCE AGAINST WOMEN: LAW AND LITIGATION 18-1 to 18-35 (David Frazee et al. eds., 1997).

[298] *See* 42 U.S.C. §§ 13981(c), (e)(1) (1994).

On a symbolic level, VAWA was a major victory for women's equality[299] and seemed to displace rigid conceptions of privacy that had for so long hidden violence against women from public recognition and public response. A federal civil rights remedy places the issue of violence against women squarely in the domain of public law rather than relegating it to private law remedies or no legal remedies at all. Notably, VAWA's challenge to traditional distinctions between public and private was applauded by a range of feminist writers whose views on privacy otherwise differ profoundly, from those who have emphasized the negative impact of privacy ideology on women[300] to those who have celebrated privacy as a potential source of freedom and autonomy for women.[301] If indeed the public-private distinction is what the feminist movement is all about,[302] it would seem that the enactment of VAWA's civil rights remedy advanced the movement's agenda significantly.

Not surprisingly, however, the battle over the issue of privacy did not end with VAWA's passage. Although the legislation had been narrowed sufficiently to allow the federal judges to withdraw their opposition, their concerns had not disappeared. There was still the danger that despite VAWA's successful journey through the legislative process, the judiciary's privacy-based opposition would reassert itself in interpretations of the statute.[303] As the following Part will show, the constitutional litigation over the Violence Against Women Act proves that judicial allegiance to the public-private distinction in both its forms threatens the survival of VAWA's civil rights remedy for gender-motivated violence.

V. THE PUBLIC-PRIVATE DICHOTOMIES REVISITED: CONSTITUTIONAL CHALLENGES TO THE VIOLENCE AGAINST WOMEN ACT

The civil rights provision of the Violence Against Women Act is predicated on the insight that acts of gender-motivated violence are not purely private harms to individual women, but are matters of public concern. Indeed, Congress's assertion of jurisdiction under the Commerce Clause and the Fourteenth

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299 *See, e.g.*, S. REP. NO. 102-197, at 85–86 (1991) (statement of Professor Burt Neuborne, New York University School of Law, stating that labeling gender-motivated violence as a civil rights violation is a major step forward for women's equality); Cass R. Sunstein, *Civil Rights Legislation in the 1990s: Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 772 n.64 (1991) (describing VAWA as "[a]n excellent example of anti-caste legislation").

300 *See, e.g.*, WEST, *supra* note 57, at 302–03; MacKinnon, *supra* note 60, at 1308 n.125; Siegel, *supra* note 76, at 2196–2206.

301 *See, e.g.*, McClain, *Reconstructive Tasks*, *supra* note 215, at 779; Schneider, *supra* note 10, at 56 n.10.

302 *See supra* note 3 and accompanying text.

303 *See* Siegel, *supra* note 76, at 2200–06.

Amendment constitutes a recognition that violence against women affects the public sphere in both senses of that term—the market and the state, respectively.[304] But the long history of viewing domestic violence, rape, and other crimes against women as private matters dictated that VAWA would meet with resistance in the courts, as it had in Congress.

Since VAWA was enacted in 1994, plaintiffs have brought claims under the new statute in lawsuits alleging various types of gender-motivated violence, including rape, sexual assault, nonsexual assault, sexual abuse of minors, wife-battering, and murder.[305] In response to these claims, a growing number of defendants have challenged the constitutionality of VAWA's civil rights provision.[306] They argue that Congress lacked constitutional authority to enact a

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[304] *See* 42 U.S.C. § 13981(a) (1994) (stating that the civil rights provision is enacted "[p]ursuant to the affirmative power of Congress... under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution").

[305] *See generally, e.g.*, Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820 (4th Cir.) (en banc), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999) (alleging gang rape by fellow students in university dormitory); Williams v. Board of County Comm'rs, No. 98-2485-JTM, 1999 U.S. Dist. LEXIS 13532 (D. Kan. Aug. 24, 1999) (alleging rape by police officer); Kuhn v. Kuhn, No. 98-C-2395, 1999 U.S. Dist. LEXIS 11010 (N.D. Ill. July 15, 1999) (alleging physical and sexual violence by husband); Bergeron v. Bergeron, 48 F. Supp. 2d 628 (M.D. La. 1999) (alleging battery, assault, and attempted rape by husband); Wright v. Wright, No. Civ. 98-572-A (W.D. Okla. Apr. 27, 1999) (alleging physical violence by defendant against wife and daughter); Ericson v. Syracuse Univ., 45 F. Supp. 2d 344 (S.D.N.Y. 1999) (alleging sexual harassment by university tennis coach); Culberson v. Doan, 65 F. Supp. 2d 701 (S.D. Ohio 1999) (alleging that defendant beat and murdered girlfriend); Doe v. Mercer, 37 F. Supp. 2d 64 (D. Mass.), *vacated and remanded on other grounds sub nom.* Doe v. Walker, 193 F.3d 42 (1st Cir. 1999) (alleging gang rape); Liu v. Striuli, 36 F. Supp. 2d 452 (D.R.I. 1999) (alleging sexual harassment and rape by university adviser); Ziegler v. Ziegler, 28 F. Supp. 2d 601 (E.D. Wash. 1998) (alleging assault, threats, and harassment by husband); Griffin v. City of Opa-Locka, No. 98-1550-Civ-Highsmith (S.D. Fla. Aug. 27, 1998) (alleging sexual harassment and sexual assault by employment supervisor); C.R.K. v. Martin, No. 96-1431-MLB, 1998 U.S. Dist. LEXIS 22305 (D. Kan. July 10, 1998) (alleging rape and threats of physical violence by fellow student at plaintiff's high school); Timm v. DeLong, 59 F. Supp. 2d 944 (D. Neb. 1998) (alleging physical and sexual abuse by husband); Mattison v. Click Corp. of Am., No. 97-CV-2736, 1998 U.S. Dist. LEXIS 720 (E.D. Pa. Jan. 27, 1998) (alleging sexual assault, battery, and harassment by employer); Crisonino v. N.Y. City Hous. Auth., 985 F. Supp. 385 (S.D.N.Y. 1997) (alleging nonsexual, gender-motivated assault by employment supervisor); Anisimov v. Lake, 982 F. Supp. 531 (N.D. Ill. 1997) (alleging assault, harassment, and rape by employer); Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997) (alleging physical and sexual abuse by husband); Doe v. Hartz, 970 F. Supp. 1375 (N.D. Iowa 1997), *rev'd on other grounds*, 134 F.3d 1339 (8th Cir. 1998) (alleging sexual abuse by priest); Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996) (alleging physical and mental abuse by husband).

[306] *See supra* cases cited in note 305.

civil rights remedy for gender-motivated violence. As noted earlier, Congress founded its authority to pass VAWA on both the Commerce Clause and section 5 of the Fourteenth Amendment, and prominent professors of constitutional law testified during hearings on VAWA that both of those sources provided Congress with a valid constitutional basis for enacting the civil rights remedy.[307]

The constitutional challenges to VAWA attempt to revive the inflexible distinctions between public and private that VAWA itself was designed to transcend. First, the challenges claim that the civil rights provision is not a legitimate exercise of Congress's Commerce Clause power because violence against women does not have sufficiently close ties to the market. Second, they argue that Congress lacked authority to enact the civil rights remedy under section 5 of the Fourteenth Amendment because violence against women does not have sufficiently close ties to the state. These constitutional challenges, by invoking the image of an irreconcilable division between family and market and between civil society and the state, simply recapitulate the public-private split in both its forms. Relying on the familiar public-private dichotomies, the defendants bringing these challenges, and the judges who agree with them, would isolate violence against women in the private sphere and thereby exclude those injuries from federal civil rights relief. In addition, the litigants and judges who embrace these arguments bring to bear a set of assumptions that, as we have seen, arise naturally from rigid adherence to conventional rubrics of public and private, such as the assumptions that women exist only in the domestic sphere and that cases affecting the family belong exclusively in state courts. Their arguments, in short, echo the judiciary's unsuccessful opposition to VAWA during the legislative process.

The overwhelming majority of courts that have confronted these claims have upheld the civil rights remedy as a legitimate exercise of Congress's legislative powers under the Constitution.[308] However, in some cases, the claim that the

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[307] *See supra* Part IV.A. Other possible constitutional bases for the civil rights remedy include the Thirteenth Amendment and the Privileges and Immunities Clause of the Fourteenth Amendment. *See 1993 House Hearing*, *supra* note 67, at 47–49 (statement of Professor Burt Neuborne, New York University School of Law). However, Congress did not claim authority to pass the legislation under those constitutional provisions, and they have not been the focus of the litigation over VAWA's constitutionality.

[308] The following federal cases have found the civil rights remedy constitutional under the Commerce Clause: *Williams*, 1999 U.S. Dist. LEXIS 13532; *Kuhn*, 1999 U.S. Dist. LEXIS 11010; Wright v. Wright, No. Civ. 98-572-A (W.D. Okla. Apr. 27, 1999); *Ericson* 45 F. Supp. 2d 344; *Culberson*, 65 F. Supp. 2d 701; *Mercer*, 37 F. Supp. 2d 64; *Liu*, 36 F. Supp. 2d 452; *Ziegler*, 28 F. Supp. 2d 601; Griffin v. City of Opa-Locka, No. 98-1550-Civ-Highsmith (S.D. Fla. Aug. 27, 1998); *C.R.K.*, 1998 U.S. Dist. Lexis 22305; *Timm*, 59 F. Supp. 2d 944; *Mattison*, 1998 U.S. Dist. LEXIS 720; *Crisonino*, 985 F. Supp. 385; *Anisimov*, 982 F. Supp. 531 (N.D. Ill. 1997); *Seaton*, 971 F. Supp. 1188; *Hartz*, 970 F. Supp. 1375; *Doe*, 929 F. Supp.

civil rights remedy is unconstitutional has met with success.[309] In the only constitutional challenge to VAWA's civil rights provision that has yet reached the United States Court of Appeals, *Brzonkala v. Virginia Polytechnic Institute & State University*,[310] the Fourth Circuit issued an en banc decision striking down the provision as unconstitutional under both the Commerce Clause and section 5 of the Fourteenth Amendment. At this writing, that case is currently before the United States Supreme Court.

The challenges to VAWA's constitutionality have been aided by two Supreme Court decisions issued after VAWA was enacted: *United States v. Lopez*,[311] which construed the scope of the Commerce Clause, and *City of Boerne v. Flores*,[312] which did the same for section 5 of the Fourteenth Amendment. However, as the following discussion will show, VAWA's civil rights remedy passes constitutional muster even in the wake of *Lopez* and *Boerne*. Properly understood, both the Commerce Clause and section 5 of the Fourteenth Amendment provide ample constitutional authority for the civil rights remedy in VAWA. As the *Brzonkala* case illustrates, the claim that VAWA is unconstitutional derives most of its support not from Supreme Court precedent, but from traditional notions of privacy.

A. *Cases Finding the Civil Rights Remedy Constitutional*

To date, nineteen cases[313] have upheld VAWA's civil rights remedy as a legitimate exercise of Congress's constitutional power to "regulate Commerce . . . among the several States."[314] A common theme in these opinions is the need for judicial restraint when reviewing congressional action under the Commerce Clause.[315] As several of these courts pointed out,[316] the independent

608. Wright v. Wright, *supra*, and Timm v. DeLong, *supra*, also found the civil rights remedy constitutional under section 5 of the Fourteenth Amendment. In addition, the following state cases have upheld the constitutionality of the civil rights provision: Fisher v. Grimes, No. 98 CVD 865 (N.C. Dist. Ct. July 22, 1999); Young v. Johnson, No. CV 97-90014 (Ariz. Sup. Ct. May 13, 1999) (written record of oral proceedings).

309 *See Brzonkala*, 169 F.3d 820; *Bergeron*, 48 F. Supp. 2d 628.

310 169 F.3d 820 (4th Cir.) (en banc), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999).

311 514 U.S. 549 (1995).

312 521 U.S. 507 (1997).

313 *See supra* cases cited in note 308.

314 U.S. CONST. art. I, § 8, cl. 3.

315 *See, e.g.*, *Ericson*, 45 F. Supp. 2d at 346–47; *Culberson*, 65 F. Supp. 2d at 707–08, 713–14; *Mercer*, 37 F. Supp. 2d at 68–70; *Liu*, 36 F. Supp. 2d at 477-78; *Ziegler*, 28 F. Supp. 2d at 608, 613; *Timm*, 59 F. Supp. 2d at 949–50; *Crisonino*, 985 F. Supp. at 395–96; *Anisimov*, 982 F. Supp. at 538–40.

judicial inquiry into the constitutionality of a statute enacted under the Commerce Clause is limited to determining "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce,"[317] and if so, whether the means chosen by Congress are "reasonably adapted to the end permitted by the Constitution."[318]

In applying this test, the courts upholding the civil rights remedy relied heavily on VAWA's massive legislative history, which includes multiple hearings and committee reports compiled over the course of more than four years.[319] The courts emphasized Congress's "extensive compilation of data, testimony, and reports"[320] and the range of witnesses who testified on the legislation, including state attorneys general, the United States Department of Justice, prosecutors, law professors, judicial organizations, mental health experts, physicians, legal advocacy groups, professional organizations, representatives of domestic violence and rape crisis programs, and victims of violence.[321] As one court concluded, "Congress held numerous hearings over a four-year period and amassed substantial documentation on how gender-based violence impacts interstate commerce," and the resulting "statistical, medical, and economic data" adequately demonstrated the rational basis for the conclusion that gender-based violence has a substantial effect on interstate commerce.[322]

Based on the evidence it received, Congress made findings concerning the impact of gender-motivated violence on interstate commerce. These findings, in turn, played a prominent role in decisions upholding the Act. For example, *Doe v. Doe*, the first federal district court ruling on the constitutionality of the civil rights remedy, quoted the following language from the Conference Report adopted by Congress when it passed VAWA:

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316 *See, e.g., Ericson*, 45 F. Supp. 2d at 346–47; *Culberson*, 65 F. Supp. 2d at 707–08, 713–14; *Mercer*, 37 F. Supp. 2d at 68–69; *Liu*, 36 F. Supp. 2d at 477; *Ziegler*, 28 F. Supp. 2d 608, 613; *Timm* 59 F. Supp. 2d at 949–50; *Crisonino*, 985 F. Supp. at 395–96; *Anisimov*, 982 F. Supp. at 538–40; *Seaton*, 971 F. Supp. at 1188–89; *Hartz*, 970 F. Supp. at 1415, 1422–23; Doe v. Doe, 929 F. Supp. at 612–13. In their Commerce Clause analysis, these courts applied the Supreme Court's decision in United States v. Lopez, 514 U.S. 549 (1995), which is discussed further *infra* in Part V.B.2.

317 *Lopez*, 514 U.S. at 557.

318 Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 276 (1981) (citing Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241, 262 (1964)).

319 *See, e.g., Culberson*, 65 F. Supp. 2d at 709 n.10; *Ziegler*, 28 F. Supp. 2d at 609–11; Doe v. Doe, 929 F. Supp. at 611.

320 Doe v. Doe, 929 F. Supp. at 614.

321 *See Culberson*, 65 F. Supp. 2d at 709; *Ziegler*, 28 F. Supp. 2d at 609-10; *Anisimov* 928 F. Supp. at 537; Doe v. Doe, 929 F. Supp. at 611.

322 *Doe*, 929 F. Supp. at 611, 615. *See also Ziegler*, 28 F. Supp. 2d at 611.

> [C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from . . . business . . . in interstate commerce; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.[323]

The *Doe* decision also quoted the following findings from the final Senate report on the legislation:

> Gender-based crimes and fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy. Gender-based violence bars its most likely targets—women—from full [participation] in the national economy. For example, studies report that almost 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime. Even the fear of gender-based violence affects the economy because it deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence.[324]

Other cases finding the civil rights remedy constitutional similarly relied on Congress's "staggering"[325] findings regarding the substantial effect of gender-motivated violence on interstate commerce.[326] As one court concluded, "[W]hen one-half of the nation's population is potentially limited in employment, traveling, and participation in commercial spending due to the threat of violence, interstate commerce and the national economy are inevitably affected."[327]

Having decided that the Commerce Clause gave Congress constitutional authority to enact a civil rights remedy for gender-motivated violence, most of these courts opted not to reach the question of whether section 5 of the Fourteenth Amendment did so as well.[328] However, two cases have proceeded to

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[323] *Doe*, 929 F. Supp. at 614 (quoting H.R. CONF. REP. NO. 103-711, at 385 (1994)) (brackets in original; ellipses added).

[324] *Id.* at 613 (quoting S. REP. NO. 103-138, at 54 (1993)) (brackets added).

[325] Doe v. Hartz, 970 F. Supp. 1375, 1421 (N.D. Iowa 1997), *rev'd on other grounds*, 134 F.3d 1339 (8th Cir. 1998).

[326] *See, e.g.*, Wright v. Wright, No. Civ. 98-572-A at 3 (W.D. Okla. Apr. 27, 1999); Crisonino v. N.Y. City Hous. Auth., 985 F. Supp. 385, 396 (S.D.N.Y. 1997); *Hartz*, 970 F. Supp. at 1421-23.

[327] Seaton v. Seaton, 971 F. Supp. 1188, 1194 (E.D. Tenn. 1997).

[328] *See, e.g.*, Ziegler v. Ziegler, 28 F. Supp. 2d 601, 614 (E.D. Wash. 1998); Doe v. Doe, 929 F. Supp. at 617.

consider whether Congress had an additional constitutional basis for enactment of the civil rights provision under section 5, which grants Congress the "power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment.[329] Both cases concluded that VAWA's civil rights remedy falls within the scope of Congress's power under section 5.[330]

Wright v. Wright found that "Supreme Court precedent supports Congress's regulation of private conduct under Section 5" and characterized VAWA as a permissible remedial statute designed to enforce the equal protection guarantees of the Fourteenth Amendment.[331] The *Wright* opinion incorporated by reference an earlier decision in the same case in which the court held that section 5 authorized Congress to regulate "purely private conduct," "even in the absence of an identifiable Equal Protection violation."[332] In the earlier opinion, the court stated that "VAWA is clearly a constitutional exercise of Congress' Section 5 power. The gender-motivated violence is private conduct that prevents its victims which are a disadvantaged group from obtaining equal protection of the laws."[333] In the alternative, the court held that even if section 5 required state action in order to justify enactment of enforcement legislation, the states' failure to protect victims of gender-based violence is sufficient state involvement to satisfy that requirement.[334]

In *Timm v. DeLong*, the court's analysis of the section 5 issue employed the second of *Wright*'s rationales. Based on congressional findings that the states have failed to address the problem of violence against women adequately, the *Timm* court concluded that the states' failure to afford women equal protection of the laws constituted sufficient state involvement to justify legislating against private discriminatory conduct under section 5 of the Fourteenth Amendment.[335]

In the course of deciding these cases, the courts have had to confront arguments rooted in the familiar public-private dichotomies. For example, *Doe v. Doe* considered and rejected defendant's argument that "VAWA encroaches on traditional police powers of the state and impermissibly 'federalizes' criminal,

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[329] U.S. CONST. amend. XIV, § 5.

[330] *See* Wright v. Wright, No. Civ. 98-572-A (W.D. Okla. Apr. 27, 1999); Timm v. DeLong, 59 F. Supp. 2d 944, 961 (D. Neb. 1998).

[331] *See* Wright v. Wright, No. Civ. 98-572-A at 5 (W.D. Okla. Apr. 27, 1999).

[332] *See* Wright v. Wright, No. Civ. 98-572-A at 5 (W.D. Okla. Apr. 27, 1999) (citing Wright v. City of Oklahoma City, No. Civ. 98-572-A (W.D. Okla. July 31, 1998) (citing United States v. Guest, 383 U.S. 745 (1966) and Katzenbach v. Morgan, 384 U.S. 641 (1966)).

[333] Wright v. City of Oklahoma City, No. Civ. 98-572-A at 6 (W.D. Okla. July 31, 1998).

[334] *See id.* at 6–8.

[335] *Timm*, 59 F. Supp. 2d at 958–61. For further discussion of the Fourteenth Amendment challenge to VAWA, see *infra* Part V.B.3.

family law, and state tort law."[336] The *Doe* court pointed out that the scope of federal jurisdiction under VAWA expressly excludes state law claims seeking establishment of a divorce, alimony, marital property, or child custody decree.[337] Moreover, *Doe* stated that VAWA's civil rights remedy "complements" state criminal, tort, and family law by making available a separate civil rights action for damages.[338] Similarly, in *Ziegler v. Ziegler*, a case alleging violence within a marital relationship, the defendant argued that the civil rights remedy was unconstitutional as applied in his case because it would "extend[ ] a federal cause of action in an area of traditional state control, i.e., family law. . . ."[339] The court replied that since VAWA is a civil rights statute that by its own terms does not confer federal jurisdiction over claims for a decree of divorce or related matters, it does not interfere with state domestic relations laws.[340]

Courts upholding the constitutionality of VAWA's civil rights remedy have not been immune to the lingering influence of traditional conceptions of privacy. In *Seaton v. Seaton*, a case upholding VAWA on Commerce Clause grounds and containing favorable dicta on the Fourteenth Amendment issue, the court wrote:

> The framers of the Constitution did not intend for the federal courts to play host to domestic disputes and invade the well-established authority of the sovereign states. . . . [T]his court must again express its deep concern that the Act will effectively allow domestic relations litigation to permeate the federal courts. Issues related to domestic relations are better suited for the state courts. . . .[341]

In a passage reminiscent of objections voiced by the Conference of Chief Justices before VAWA was enacted,[342] the *Seaton* opinion stated, "[T]his particular remedy created by Congress, because of its extreme overbreadth, opens the doors of the federal courts to parties seeking leverage in [divorce] settlements rather than true justice."[343] When language this negative appears in

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[336] Doe v. Doe, 929 F. Supp. 608, 615–16 (D. Conn. 1996).

[337] *See id.* at 616 (citing 42 U.S.C. § 13981(e)(4) (1994)).

[338] *See Doe*, 929 F. Supp. at 616; *see also* Ziegler v. Ziegler, 28 F. Supp. 2d 601, 612 (E.D. Wash. 1998) ("A civil rights remedy is recognized as distinct from that of a criminal conviction or a civil remedy for a tort. Criminal convictions vindicate the state interest in protecting its citizens while a civil tort addresses personal injury. A civil rights claim by contrast addresses equality, a victim's interest in equal treatment.") (citations omitted).

[339] *Ziegler*, 28 F. Supp. 2d at 614.

[340] *See id.*

[341] Seaton v. Seaton, 971 F. Supp. 1188, 1190–91, 1194 (E.D. Tenn. 1997).

[342] *See supra* Part IV.B.

[343] *Seaton*, 971 F. Supp. at 1190.

the context of a victory for VAWA, it is clear that the privacy concerns raised by the judiciary during the legislative process have not been extinguished.

B. *The Fourth Circuit Finds the Civil Rights Remedy Unconstitutional:* Brzonkala v. Virginia Polytechnic Institute & State University

Although the vast majority of courts to address the issue have upheld the constitutionality of the civil rights remedy, the only case to reach the federal court of appeals to date resulted in an en banc opinion finding the remedy unconstitutional. The Fourth Circuit's decision in that case, *Brzonkala v. Virginia Polytechnic Institute & State University*,[344] provides a vivid illustration of the lingering power of stereotypes based on the public-private dichotomies and their ability to color legal analysis.[345] The *Brzonkala* case presents the most fully developed constitutional challenge to VAWA and is currently under review in the United States Supreme Court.

1. *Facts and Procedural History*

According to the plaintiff's complaint,[346] Christy Brzonkala had recently enrolled as a freshman at Virginia Polytechnic Institute and State University (Virginia Tech) when she was raped by defendants Antonio Morrison and James Crawford, students at Virginia Tech and members of the school's football team.[347] Within minutes after she met the two men for the first time, they took turns pinning her down on a bed in a room in her dormitory and forcibly raping her.[348] After raping Brzonkala, Morrison said to her, "You better not have any

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[344] The only other case that has held the civil rights remedy to be unconstitutional is Bergeron v. Bergeron, 48 F. Supp. 2d 628 (M.D. La. 1999), a federal district court decision that adopted the Fourth Circuit's reasoning in *Brzonkala*.

[345] 169 F.3d 820 (4th Cir.) (en banc), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999).

[346] *See generally* Plaintiff's Amended Complaint, Brzonkala v. Virginia Polytechnic Inst. & State Univ., 935 F. Supp. 779 (W.D. Va. 1996) (No. 95-1358-R), *rev'd*, 132 F.3d 949 (4th Cir. 1997), *vacated and reh'g en banc granted* (Feb. 5, 1998), *aff'd*, 169 F.3d 820 (4th Cir.) (en banc), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999). Because the case was decided on a motion to dismiss filed under Federal Rule of Civil Procedure 12(b)(6), plaintiff's factual allegations must be taken as true. *See Brzonkala*, 935 F. Supp. at 783.

[347] *See* Plaintiff's Amended Complaint at 4–6.

[348] *See id.* at 6–7.

fucking diseases."[349] Later, Morrison announced publicly in the dormitory's dining room, "I like to get girls drunk and fuck the shit out of them."[350]

In the weeks following the rapes, Brzonkala became depressed and withdrawn and stopped attending classes.[351] She attempted to commit suicide and sought psychiatric treatment.[352] After Brzonkala filed a complaint against Morrison and Crawford under Virginia Tech's Sexual Assault Policy, she learned that another male student athlete had advised Crawford that he should have "killed the bitch."[353]

The Virginia Tech judicial committee conducted a disciplinary hearing.[354] The committee found insufficient evidence to take action against Crawford but found Morrison guilty of sexual assault and imposed a punishment of immediate suspension from the school for two semesters.[355] However, after a second hearing, the judicial committee found Morrison guilty of the lesser charge of "using abusive language," and the sanction of an immediate suspension was set aside on appeal.[356] When she learned from newspaper accounts that Morrison would be returning to Virginia Tech on a full athletic scholarship, Brzonkala, humiliated and fearful for her own safety, canceled her plans to return to school.[357]

Brzonkala filed suit in the United States District Court for the Western District of Virginia alleging, inter alia, that Morrison and Crawford had violated her civil rights under the Violence Against Women Act.[358] Morrison and Crawford filed a motion to dismiss on the grounds that Brzonkala had failed to state a claim under VAWA and that VAWA is unconstitutional.[359] The United States intervened to defend the constitutionality of the statute.[360] The federal district court granted the motion to dismiss, finding that Brzonkala had stated a valid claim under VAWA's civil rights provision but holding that the provision

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[349] *Id.* at 7.

[350] *Id.* at 8.

[351] *See id.*

[352] *See id.*

[353] *Id.* at 10.

[354] *See id.* at 10–12.

[355] *See id.* at 12.

[356] *Id.* at 15–17.

[357] *See id.* at 16, 18.

[358] *See id.* at 2. Plaintiff's complaint also raised claims under Title IX of the Education Amendments of 1972 and state tort law, which are beyond the scope of the present discussion. *See id.*

[359] *See Brzonkala*, 935 F. Supp. at 783.

[360] *See id.* at 781.

is unconstitutional under the Commerce Clause and section 5 of the Fourteenth Amendment.[361] A panel of the Fourth Circuit reversed, holding that Brzonkala had stated a valid claim and that Congress had constitutional authority to enact the civil rights remedy under the Commerce Clause.[362] After vacating the panel decision and granting rehearing en banc, the Fourth Circuit held that Brzonkala had stated a claim under the civil rights provision but that the provision is unconstitutional because neither the Commerce Clause nor section 5 of the Fourteenth Amendment granted Congress authority to create the civil rights remedy.[363]

2. *The Commerce Clause Issue*

In its analysis of VAWA under the Commerce Clause, the Fourth Circuit relied heavily on the Supreme Court's decision in *United States v. Lopez*.[364] In *Lopez*, the Supreme Court held by a five to four vote that Congress had exceeded its authority under the Commerce Clause when it enacted the Gun-Free School Zones Act of 1990, a statute that made knowingly possessing a firearm in a school zone a federal criminal offense.[365] Chief Justice Rehnquist's opinion for the Court identified three broad categories of activities to which Congress's Commerce Clause power extends: Congress may regulate the use of the channels of interstate commerce; the instrumentalities of interstate commerce or persons or things in interstate commerce; and activities that substantially affect interstate commerce.[366] After concluding that neither of the first two categories could conceivably apply, the court analyzed the Gun-Free School Zones Act under the third category.[367]

The Court described the challenged statute as a criminal law "that by its terms has nothing to do with 'commerce' or any sort of economic enterprise,

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361 *See id.* at 779.

362 *See Brzonkala*, 132 F.3d at 974. The panel voted two to one, with Judge Motz writing the majority opinion, in which Judge Hall joined, and Judge Luttig writing a dissent.

363 *See Brzonkala*, 169 F.3d 820, 889 (4th Cir.) (en banc), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999). The court reached its decision by a seven to four vote. The majority opinion was written by Judge Luttig, who had dissented from the earlier panel decision, and was joined by six other judges. Chief Judge Wilkinson and Judge Niemeyer wrote concurring opinions. Judge Motz, who had written the majority opinion for the panel, wrote a dissent, in which three other judges joined.

364 514 U.S. 549 (1995).

365 *See id.*

366 *See id.* at 558–59.

367 *See id.* at 559.

however broadly one might define those terms."[368] However, this was not the end of the inquiry. After noting that the Gun-Free School Zones Act did not contain a jurisdictional element that would require proof of an effect on interstate commerce in each case, the Court proceeded to examine whether gun possession in school zones in general has a substantial effect on interstate commerce.[369] The Court stated that "no such... effect was visible to the naked eye" and that Congress had failed to make any findings of such an effect when it passed the statute.[370] In the absence of such findings, the Government argued that possession of a firearm in a school zone could result in violent crime, which is costly and reduces people's willingness to travel to areas perceived as unsafe; the government also argued that guns in schools undermine the educational process, which will result in a less productive citizenry, with adverse effects on the nation's economy.[371] The Court responded that to uphold the Government's contentions, "we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[372] Under the Government's theory, the Court wrote, "it is difficult to perceive any limitation on federal power."[373]

The *Lopez* case reveals a deep concern about issues of federalism, and especially about federal intrusion in areas traditionally controlled by the states. The opinion of the Court described criminal law as an area "where States historically have been sovereign"[374] and criticized the Gun-Free School Zones Act for overriding and displacing state law.[375] Justice Kennedy's concurrence, joined by Justice O'Connor, emphasized even more strongly the dangers of allowing Congress to "take over the regulation of... areas of traditional state concern."[376]

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[368] *Id.* at 561.

[369] *See id.* at 561–68.

[370] *Id.* at 562–63. The Court stated that congressional findings are neither necessary nor sufficient for the Court to find a substantial effect on interstate commerce, which is a judicial rather than legislative determination. *See id.* at 557 n.2, 562–63. However, findings by Congress and by congressional committees can assist the Court in evaluating the legislative judgment that the activity in question substantially affects interstate commerce. *See id.* at 562–63.

[371] *See id.* at 564. The Court characterized these two arguments as the "costs of crime" argument and the "national productivity" argument, respectively. *See id.*

[372] *Id.* at 567.

[373] *Id.* at 564.

[374] *Id.*

[375] *See id.* at 561 n.3.

[376] *See id.* at 577 (Kennedy, J., concurring).

The Gun-Free School Zones Act struck down in *Lopez* is readily distinguishable from the Violence Against Women Act's civil rights provision.[377] In the process of passing VAWA, Congress made extensive findings, based on numerous hearings and studies conducted over more than four years, demonstrating the enormous effects of gender-motivated violence on interstate commerce.[378] Thus, there is no need to "pile inference upon inference" in order to establish those effects.[379] Also, the connection of gender-motivated violence to interstate commerce is far more direct than the speculative, attenuated connection adduced by the Government in *Lopez*.[380] Contrary to the concerns expressed in *Lopez* by both the majority opinion and Justice Kennedy's concurrence, VAWA does not intrude in an area of law traditionally controlled by the states; it is a civil rights remedy, and civil rights remedies have historically been the province of the federal courts.[381] Rather than duplicating state laws on the same subject, as the Gun-Free School Zones Act did, VAWA's civil rights remedy was passed to protect an equality interest that was not adequately addressed by existing state and federal laws.[382]

And yet, in *Brzonkala*, the court of appeals, sitting en banc, affirmed the district court's holding that the civil rights remedy exceeds Congress's authority under the Commerce Clause.[383] In so doing, the *Brzonkala* case reveals the familiar tendency to equate women with the domestic sphere, with privacy, and with state jurisdiction.

The en banc opinion placed considerable emphasis on the fact that VAWA's

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[377] On the constitutionality of VAWA in the wake of *Lopez*, see generally, e.g., Kerrie E. Maloney, Note, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After Lopez*, 96 COLUM. L. REV. 1876 (1996); Johanna R. Shargel, Note, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 YALE L.J. 1849 (1997).

[378] *See supra* Parts IV.A, V.A.

[379] *Lopez*, 514 U.S. at 567.

[380] In *Lopez*, the United States relied on arguments that guns in schools might cause violent crime, which is costly, and could undermine the educational process, resulting in a less productive national workforce. *See id.* at 564. By contrast, the legislative history of VAWA includes findings that, for example, almost 50% of rape victims lose their jobs or are forced to quit in the aftermath of the crime, and that actual and threatened gender-based violence prevent women from traveling interstate and from engaging in employment in interstate business. *See* H.R. CONF. REP. NO. 103-711, at 385; S. REP. NO. 103-138, at 54 (1993).

[381] *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820, 932 (4th Cir.) (en banc) (Motz, J., dissenting), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999).

[382] *See id.* at 930 (Motz, J., dissenting) (arguing that VAWA "acts to supplement, rather than supplant, state law").

[383] *See id.* at 889.

civil rights provision would cover violence within the family.[384] In fact, by attacking the statute on the basis of its coverage of intrafamily violence, the opinion effectively conflated all violence against women with domestic violence.[385] Given the facts alleged in the case at hand—a gang rape of a young woman at a public university by two men whom she had just met—this approach seems highly arbitrary. After positioning violence against women in the private, domestic sphere, the opinion proceeded to invoke the doctrine of legal nonintervention in the affairs of the family by criticizing VAWA for overriding "interspousal and intrafamily tort immunity, the marital rape exemption, and other defenses that may exist under state law by virtue of the relationship that exists between the violent actor and victim."[386] As we have seen, these now-discredited doctrines are relics of both the marital unity theory and the separate spheres ideology. Nevertheless, the *Brzonkala* court defended the states' freedom to "calibrate the extent of judicial supervision of intrafamily violence" through such doctrines and deplored the creation of a civil rights remedy that would cover gender-motivated violence within the family.[387]

Having characterized all gender-motivated violence as belonging to the domestic sphere, the *Brzonkala* court concluded that such conduct has insufficient impact on commerce. The court of appeals stated that VAWA "does not regulate even arguably economic activity."[388] Of course, under *Lopez*, the fact that an activity is not overtly economic is not determinative. Instead, the crucial question is whether the activity substantially affects interstate commerce.[389] To that question, the district court and the court of appeals answered with a resounding "no." Although the trial judge conceded that the impact of violence against women on interstate commerce is more immediate than that of possessing guns in school zones, he nevertheless concluded that the VAWA, like the Gun-Free School Zones Act, regulates activity that is simply "too remote" from interstate commerce.[390] Similarly, the en banc opinion

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[384] *See id.* at 842.

[385] *See id.* (describing domestic violence as "a primary focus" of the civil rights remedy); *see also id.* at 904–05 (Niemeyer, J., concurring) (using phrase "domestic violence" as a synonym for gender-motivated violence).

[386] *Id.* at 843, 873.

[387] *See id.* at 843. The court conceded that "Congress may well be correct . . . that these defenses represent regrettable public policy," but asserted that the question of whether to eliminate them should rest with the states. *Id.*

[388] *See id.* at 835; *see also id.* at 834 (stating that gender-motivated violence is "[n]ot only . . . clearly not commercial, it is not even economic in any meaningful sense").

[389] *See id.* at 917–18 (Motz, J., dissenting) (citing United States v. Lopez, 514 U.S. 549 (1995)).

[390] *Brzonkala*, 935 F. Supp. at 790–91.

described the impact of gender-motivated violence on interstate commerce as too indirect to justify legislation under the Commerce Clause.[391]

The conclusion that violence against women lacks substantial effects on interstate commerce is curious in light of the voluminous congressional findings of just such effects.[392] Given the overwhelming evidence in the legislative history that violence against women dramatically and directly affects women's employment, health care, consumer spending, and interstate travel, among other economic factors, it is difficult to understand the *Brzonkala* court's assertion that violence against women has less economic impact than a farmer's production of homegrown wheat for personal consumption.[393] The *Brzonkala* court's refusal to find adequate effects on interstate commerce is particularly surprising when one considers the highly deferential test established for determining whether Congress had authority to enact legislation under the Commerce Clause.[394]

Brzonkala's refusal to acknowledge the substantial effects of gender-based violence on interstate commerce makes perfect sense when seen as a manifestation of the assumption that the domestic sphere and market sphere are mutually exclusive, and what occurs in the former has no effect on the latter. At oral argument, one judge asked the Justice Department lawyer defending

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391 *See Brzonkala*, 169 F.3d at 851.

392 *See generally supra* Parts IV.A and V.A. *Brzonkala* contended that much of VAWA's legislative history considered the impact on interstate commerce of violence against women in general, and therefore was irrelevant to the establishment of a civil rights remedy for gender-motivated violence specifically. *See Brzonkala*, 169 F.3d at 849–50. However, Congress heard testimony that violence against women is often motivated by the victim's gender. See *1993 House Hearing*, *supra* note 67, at 5 (statement of Sally Goldfarb, Senior Staff Attorney, NOW Legal Defense and Education Fund); *1991 Senate Hearing*, *supra* note 250, at 262 (statement of Dr. Leslie R. Wolfe, Executive Director, Center for Women Policy Studies); *see also Brzonkala*, 160 F.3d at 851 (citing congressional findings concerning the impact of gender-motivated violence on interstate commerce and conceding that the legislative record "supports an inference that some portion of [violence against women], and the toll that it exacts, is attributable to gender animus").

393 *See Brzonkala*, 169 F.3d at 835 (citing Wickard v. Filburn, 317 U.S. 111 (1942)); *see also id.* at 916 (Motz, J., dissenting) (stating that "[c]ertainly legislators could rationally find that the impact of gender-motivated violence on interstate commerce was at least as substantial as the impact of growing wheat for home consumption" and citing *Wickard*, *supra*).

394 *Lopez*, although it struck down a federal statute under the Commerce Clause for the first time in almost sixty years, did not overturn but rather reaffirmed previous Commerce Clause cases. *See* United States v. Lopez, 514 U.S. 549, 553–61 (1995). Under that precedent, the relevant test is simply "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce," *see id.* at 557, and if so, "'the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution.'" Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 276 (1981) (citing Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241, 262 (1964)).

VAWA's constitutionality, "If we have a domestic assault that occurs in the bedroom between a man and a woman, how does that affect commerce?"[395] In a similar vein, Chief Judge Wilkinson's concurring opinion states, "By attaching civil penalties to criminal, but domestic, conduct, [the civil rights provision] 'by its terms has nothing to do with "commerce."'"[396]

The court's view of violence against women and market relations as taking place in two separate spheres is ironic given the facts alleged in the *Brzonkala* case. The plaintiff alleged that the rape she suffered on campus caused her to leave Virginia Tech without receiving the education for which she had paid.[397] In other contexts, paying for a college education has been found to be "a quintessential commercial transaction."[398]

Thus, the *Brzonkala* court erred by equating all violence against women with domestic violence, and then compounded that error by assuming that domestic violence has no substantial effects on interstate commerce. In fact, as Congress found, violence against women—including domestic violence—has massive economic effects.[399] The Senate Judiciary Committee cited estimates that domestic violence costs society between five and ten billion dollars a year.[400] One particularly significant effect of domestic violence is its role in causing women's disproportionate rates of homelessness, poverty, and dependency on welfare. Contrary to *Brzonkala's* assertion that gender-motivated violence is "a

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395 *See* Jan Vertefeuille, *Appeals Court Scrutinizes Violence Against Women Act*, ROANOKE TIMES & WORLD NEWS, Mar. 4, 1998, at B3 (quoting Judge Paul Niemeyer at oral argument en banc).

396 *Brzonkala*, 169 F.3d at 896 (Wilkinson, C.J., concurring) (citing *Lopez*, 514 U.S. at 561).

397 *See* Plaintiff's Amended Complaint at 18 (alleging Virginia Tech failed to refund plaintiff's expenses for room, board, books, and fees). The damaging effect of campus rape on women's educational opportunities, and the resulting erosion of young women's future earning potential, were subjects covered in VAWA's legislative history. *See 1993 House Hearing*, *supra* note 67, at 4 (statement of Sally Goldfarb, Senior Staff Attorney, NOW Legal Defense and Education Fund); *1991 Senate Hearing*, supra note 250, at 243 (statement of Elizabeth Athanasakos, President, National Federation of Business and Professional Women, Inc.); S. REP. NO. 101-545, at 43-44 (1990).

398 United States v. Brown Univ., 5 F.3d 658, 666 (3d Cir. 1993) (applying Sherman Act to university financial aid policy); *see also* United States v. Sherlin, 67 F.3d 1208, 1213 (6th Cir. 1995) (classifying college as an "activity affecting interstate commerce" for purpose of prosecution under federal arson statute).

399 *See, e.g.*, S. REP. NO. 101-545, at 33 (1990) ("It is not a simple matter of adding up medical costs, or law enforcement costs, but of adding up all those expenses plus the costs of lost careers, decreased productivity, foregone educational opportunities, and long-term health problems.").

400 *See* S. REP. NO. 103-138, at 41 (1993).

type of crime relatively unlikely to have any economic character at all,"[401] such violence is to a large degree responsible for excluding women from successful participation in the economy altogether. The Senate Judiciary Committee pointed out that "as many as 50 percent of homeless women and children are fleeing domestic violence."[402] The need to flee their homes also forces victims of domestic violence to rely on welfare.[403]

In addition, abusive spouses or partners often prevent women from getting or keeping jobs.[404] Studies have shown that when a woman attempts to escape from poverty or welfare dependency by seeking education or employment, an abusive spouse or partner often directly sabotages those efforts by inflicting physical injury, destroying materials the woman needs for work or school, or harassing the woman at her place of employment so that she is fired or forced to quit.[405] If a battered woman manages to keep her job, episodes of domestic violence frequently cause her to miss work, arrive late, and perform unproductively, with resulting costs to her employer and to her own career prospects.[406] Even when the violence has ended, the long-term physical and psychological effects of abuse often make it impossible for a woman to function successfully in the work force.[407]

As these facts suggest, far from having no effect on the public sphere of the marketplace, domestic violence has the very pronounced effect of preventing women from becoming equal participants in that sphere. Like domestic violence, other forms of gender-motivated violence—such as stranger rape—also prevent women from participating freely in the economy. Studies indicate that almost fifty percent of rape victims quit or are fired in the aftermath of the crime.[408]

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401 *Brzonkala*, 169 F.3d at 834.

402 *See* S. REP. NO. 101-545, at 37 (1990) (citation omitted).

403 *See* Ruth A. Brandwein, *Family Violence, Women, and Welfare, in* BATTERED WOMEN, CHILDREN, AND WELFARE REFORM: THE TIES THAT BIND 3, 7 (Ruth A. Brandwein ed., 1999).

404 *See 1992 House Hearing, supra* note 246, at 117 (statement of Marcella Maxwell, Chairperson, New York City Commission on the Status of Women, stating that "women cannot work because of possessive/abusive spouses, or they are limited to working in places where the spouse can maintain control or contact").

405 *See* Jody Raphael, *Keeping Women Poor: How Domestic Violence Prevents Women From Leaving Welfare and Entering the World of Work, in* BATTERED WOMEN, CHILDREN, AND WELFARE REFORM: THE TIES THAT BIND, *supra* note 403, at 31–43.

406 *See 1990 Senate Hearing, supra* note 244, at 70 (statement of Helen Neuborne, Excecutive Director, NOW Legal Defense and Education Fund); *1991 Senate Hearing, supra* note 250, at 239-43 (statement of Elizabeth Athanasakos, President, National Federation of Business and Professional Women, Inc.); S. REP. NO. 101-545, at 37 (1990).

407 *See* Brandwein, *supra* note 403, at 7–8.

408 *See* S. REP. NO. 103-138, at 54 (1993).

Fear of rape takes a substantial toll on women's earning opportunities by deterring women from taking well-paying jobs that are perceived as dangerous because of their hours, location, or the need to take unsafe public transportation.[409] This deterrent effect limits the employment options of women as a group.[410]

Despite *Brzonkala's* statement that gender-motivated violence "lacks a meaningful connection with any particular, identifiable economic enterprise or transaction," it is clear that such violence is a major obstacle to women's employment and that employment is unquestionably an "identifiable economic enterprise or transaction."[411] Moreover, unlike other phenomena that might stand in the way of employment, such as violent crime in general,[412] gender-motivated violence does so through the mechanism of discrimination.[413] By impeding women's ability to be gainfully employed, gender-motivated violence has contributed substantially to women's economic inferiority to men.[414] VAWA is part of a broad statutory scheme to ensure women's equal participation in employment, a scheme that also includes Title VII.[415] When discrimination functions as a barrier to a disadvantaged group's full-fledged participation in the

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[409] *See 1993 House Hearing, supra* note 67, at 40–41 (testimony of Professor Burt Neuborne, New York University School of Law); S. REP. NO. 103-138, at 54 (1993); S. REP. NO. 102-197, at 38–39 (1991).

[410] *See 1993 House Hearing, supra* note 67, at 109 (statement of James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, stating that "women, as a group, are deterred from engaging in commerce. The deterrent message extends far beyond those touched immediately by crime to all women").

[411] *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820, 834 (4th Cir.) (en banc), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999); *see also id.* at 839 n.8 (stating that gender-motivated violence affects no specific enterprise with clear links to the economy).

[412] *But see id.* at 860 (asserting that the effects of gender-motivated violence on interstate commerce are identical to those of crime in general).

[413] *See, e.g., 1993 House Hearing, supra* note 67, at 109 (statement of James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, stating that "[i]t is the bias element that sets these crimes apart and strengthens the Commerce Clause rationale for reaching them").

[414] On the discriminatory impact of violence against women, see generally *supra* Part II. *See also, e.g.*, Martha F. Davis & Susan J. Kraham, *Protecting Women's Welfare in the Face of Violence*, 22 FORDHAM URB. L.J. 1141, 1144 (1995) ("[V]iolence affects poor women in two critical ways: it makes them poor and it keeps them poor."); *see also* Goldscheid, *supra* note 68, at 147 (stating that male batterers interfere with women's employment in order to ensure conformity to traditional gender roles).

[415] *See, e.g.*, H.R. CONF. REP. NO. 103-711, at 385 (1994); S. REP. NO. 103-138, at 52–53 (1993).

national economy, antidiscrimination legislation enacted under the Commerce Clause is an appropriate response.[416]

Another prominent theme in *Brzonkala's* Commerce Clause analysis is the desire to exclude family-related cases from federal jurisdiction. This theme appears in the opinion in two forms: a concern that VAWA's civil rights provision actually brings family law cases into the federal courts, and a concern that if VAWA is permissible under the Commerce Clause, then a substantive federal domestic relations law would also be permissible.

On the first point, the *Brzonkala* court quoted with approval Chief Justice Rehnquist's statement, made while VAWA was pending in Congress, that the civil rights provision "could involve the federal courts in a whole host of domestic relations disputes."[417] Although *Brzonkala* conceded that VAWA's statutory language expressly precludes the federal courts from exercising jurisdiction over state law claims for domestic relations decrees, the court treated this limiting language as a danger sign rather than a source of reassurance.[418] "[T]he fact that Congress found it necessary to include such a jurisdictional disclaimer," the court wrote, "confirms both the factual proximity of the conduct regulated by [the civil rights provision] to the traditional objects of family law, and the extent of [the provision's] arrogation to the federal judiciary of jurisdiction over controversies that have always been resolved by the courts of the several States."[419] Accordingly, the court concluded, VAWA's coverage of

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[416] *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 304 (1964) ("Congress acted well within its power to protect and foster commerce" when it prohibited race discrimination in restaurants after hearing testimony that such discrimination adversely affects interstate commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261–62 (1964) (holding that Congress could constitutionally forbid hotels to discriminate on the basis of race because such race discrimination obstructs interstate commerce); *see also 1993 House Hearing*, *supra* note 67, at 43–44 (statement of Professor Burt Neuborne, New York University School of Law, stating that Congress's authority to enact civil rights remedy under the Commerce Clause is "supported by a need to eradicate the destructive effects of gender bias from our economic system"); *id.* at 60 (statement of Professor Cass Sunstein, University of Chicago Law School, stating that violent discrimination presents a stronger case for legislation under the Commerce Clause than nonviolent discrimination of the type at issue in *Heart of Atlanta Motel*). A number of cases upholding VAWA relied on *McClung* or *Heart of Atlanta Motel* as precedent for Congress's ability to use the Commerce Clause to combat discrimination. *See, e.g.*, Ziegler v. Ziegler, 28 F. Supp. 2d 601, 612 (E.D. Wash. 1998); Crisonino v. N.Y. City Hous. Auth., 985 F. Supp. 385, 397 (S.D.N.Y. 1997); Seaton v. Seaton, 971 F. Supp. 1188, 1194-95 (E.D. Tenn. 1997); Doe v. Doe, 929 F. Supp. 608, 617 (D. Conn. 1996).

[417] *Brzonkala*, 169 F.3d at 842 (quoting Rehnquist, *1991Year-End Report*, *supra* note 269, at 3).

[418] *See id.*

[419] *Id.* (citations omitted). In fact, as noted *supra* in Parts IV.B and IV.C , the reason that

domestic violence, which "frequently arise[s] from the same facts that give rise to issues such as divorce and child custody," is likely to embroil the federal courts in issues that "lie at the very core of family law."[420] The flaws of this argument have already been noted: not all VAWA cases arise in a domestic setting; state courts have never had a monopoly on family-related issues; VAWA creates a civil rights claim and expressly excludes domestic relations causes of action; and VAWA is an antidiscrimination statute that complements, rather than supplants, state family law.[421]

The *Brzonkala* opinion also claims that any rationale under which Congress had authority to enact VAWA under the Commerce Clause would apply equally strongly to allowing Congress to usurp the entire field of domestic relations law.[422] This argument completely disregards the discriminatory aspect of gender-motivated violence, which is the entire focus of VAWA's civil rights provision. Gender-motivated violence does not merely affect interstate commerce; it does so by excluding a disadvantaged group from equal participation in interstate commerce.[423] As a civil rights statute, VAWA responds directly to this discriminatory economic impact. Thus, there is no legitimate analogy between a federal statute prohibiting gender-motivated violence and a federal statute establishing a national law of divorce.

Congress found it necessary to include such a jurisdictional disclaimer was to meet the demands of the federal judiciary.

[420] *See id.*; *see also id.* at 896 (Wilkinson, C.J., concurring) ("VAWA's civil suit provision falters for the most basic of reasons. Section 13981 scales the last redoubt of state government—the regulation of domestic relations.").

[421] *See supra* Parts III.A.3, IV.A, IV.B.

[422] *See Brzonkala*, 169 F.3d at 828 (approving district court's conclusion that "the practical implications of concluding that gender-motivated violence was sufficiently related to interstate commerce to justify its regulation would be to grant Congress power to regulate virtually the whole of criminal and domestic relations law"); *id.* at 843 ("[T]o adopt such an understanding of Congress' power to regulate interstate commerce would be to extend federal control to a vast range of problems falling within even the most traditional areas of state concern . . . even divorce. . . ."); *id.* at 854 (arguing that the congressional findings relied on by VAWA's defenders "would justify federal regulation, and even occupation, of the entire field of family law, including divorce, alimony, child custody, and the equitable division of property"); *id.* at 859 (noting that if "Congress can regulate any problem solely by finding that it affects the economy and has not been fully remedied by the States," then Congress can "directly and perhaps exclusively" regulate core areas of family law including divorce, alimony, equitable division of property, and child custody).

[423] *See* S. REP. NO. 103-138, at 54 (1993) ("Gender-based violence bars its most likely targets—women— from full [participation] in the national economy.").

3. *The Fourteenth Amendment Issue*

Section 5 of the Fourteenth Amendment, sometimes known as the Enforcement Clause, is a "positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[424] Under section 5, Congress is not limited to prohibiting acts that violate the Equal Protection Clause,[425] but may go further and pass laws designed to prevent or remedy such acts.[426]

During its deliberations on the Violence Against Women Act, Congress was presented with two distinct theories under which section 5 provides constitutional authority for enactment of the civil rights remedy. First, under section 5, Congress may prohibit purely private conduct that interferes with the equality values protected by section 1 of the Fourteenth Amendment.[427] On this theory, Congress may pass VAWA because acts of gender-motivated violence fundamentally erode women's opportunities for equality. Second, section 5 permits Congress to prohibit private conduct as a prophylactic measure to prevent or correct state action that would violate section 1 of the Fourteenth Amendment.[428] This theory allows Congress to pass the civil rights remedy in response to the discrimination practiced by state actors whose inadequate legal remedies and outright gender bias have denied female crime victims equal protection of the laws.[429]

After VAWA was signed into law, the Supreme Court decided *City of*

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[424] Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

[425] *Compare* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."), *with* § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article").

[426] *See generally, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997); Katzenbach v. Morgan, 384 U.S. 641 (1966).

[427] *See 1993 House Hearing, supra* note 67, at 46 (statement of Professor Burt Neuborne, New York University School of Law, citing District of Columbia v. Carter, 409 U.S. 418 (1973); Griffin v. Breckenridge, 403 U.S. 88 (1971); United States v. Guest, 383 U.S. 745 (1966)); *1991 Senate Hearing, supra* note 250, at 98 (same). As noted *supra* in Part V.A, Wright v. Wright, No. Civ. 98-572-A (W.D. Okla. Apr. 27, 1999), adopted this theory.

[428] *See 1993 House Hearing, supra* note 67, at 63–64 (statement of Professor Cass Sunstein, University of Chicago Law School, citing City of Rome v. United States, 446 U.S. 156 (1980)); *1991 Senate Hearing, supra* note 250, at 119–20 (same).

[429] *See 1993 House Hearing, supra* note 67, at 64–67 (statement of Cass Sunstein, University of Chicago Law School); *1991 Senate Hearing, supra* note 250, at 120-23 (same); *see also* Wright v. Wright, No. Civ. 98-572-A at 5 (W.D. Okla. Apr. 27, 1999); Timm v. DeLong, 59 F. Supp. 2d 944, 960 (D. Neb. 1998).

Boerne v. Flores,[430] potentially complicating the question of Congress's authority to enact the civil rights provision under section 5. In *Boerne*, the Supreme Court invalidated the Religious Freedom Restoration Act (RFRA). Congress passed RFRA in an explicit effort to override the standard adopted by the Supreme Court in *Employment Division v. Smith*.[431] *Smith* had held that the Fourteenth Amendment did not require the states to have a compelling justification for neutral, generally applicable laws that substantially burden religious practices.[432] RFRA sought to reimpose such a requirement.[433] In *Boerne*, the Court held that section 5 is a remedial provision and does not confer on Congress the power to alter the substantive rights guaranteed by section 1 of the Fourteenth Amendment.[434] The Court also stated that when Congress attempts to enact a preventive or remedial measure, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[435]

The *Boerne* case is not fatal to VAWA's civil rights remedy. The Supreme Court stressed in *Boerne* that congressional enactments under section 5 are entitled to great (although not unlimited) deference.[436] VAWA, unlike RFRA, did not purport to bring about "a substantive change in constitutional protections."[437] Whereas the court in *Boerne* noted that RFRA's legislative history was unable to document any instances of religious persecution occurring within the past forty years,[438] VAWA's legislative history was rife with examples of current state practices that discriminate against female victims of violent crime.[439] Moreover, *Boerne* reaffirmed that section 5 grants Congress "wide latitude" to pass "[l]egislation which deters or remedies constitutional violations . . . even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the states.'"[440]

Subsequently, in the 1999 case of *Florida Prepaid Postsecondary Education*

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[430] 521 U.S. 507 (1997).

[431] *See id.* at 521 U.S. at 512–16 (citing Employment Division v. Smith, 494 U.S. 872 (1990)).

[432] *See id.* at 512–14.

[433] *See id.* at 514–16.

[434] *See id.* at 520–29.

[435] *Id.* at 520.

[436] *See id.* at 536.

[437] *See id.* at 532.

[438] *See id.* at 530–33.

[439] *See supra* Part IVA. See also *infra* notes 447–50 and 461–63 and accompanying text.

[440] *Boerne*, 521 U.S. at 518, 520 (citation omitted).

Expense Board v. College Savings Bank,[441] the Court again stated that section 5 permits Congress to pass legislation designed to remedy or prevent transgressions of the Fourteenth Amendment's substantive guarantees, even where doing so involves prohibiting conduct that is not itself unconstitutional. In that case, the court struck down the Patent Remedy Act, which provided a federal damages remedy against states for patent infringement. Like RFRA, and unlike VAWA, the Patent Remedy Act was passed without any record that the states were engaging in a pattern of constitutional violations.[442]

The Fourth Circuit in *Brzonkala* relied heavily on the *Boerne* decision for its holding that VAWA's civil rights provision was not a valid legislative enactment under section 5.[443] The Fourth Circuit misapplied *Boerne* in three important respects. First, *Brzonkala* found that no state action was present to justify VAWA's civil rights remedy.[444] Second, *Brzonkala* held that section 5 permits Congress only to regulate state action and provides no basis for creating a claim against private actors.[445] Relying on *Boerne*, *Brzonkala* also found that the civil rights remedy lacks the requisite congruence and proportionality between the means employed and the ends sought to be achieved.[446] Each of these conclusions is incorrect.

The *Brzonkala* court's analysis improperly dismissed the significance of Congress's findings, based on extensive empirical evidence, that "existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws."[447] The legislative history is replete with evidence that the states often treat "crimes disproportionately affecting women . . . less seriously than comparable crimes against men."[448] Female victims of rape and domestic violence face barriers of state law and policy that are not imposed on other crime victims.[449] Many of

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441 119 S. Ct. 2199, 2206-07 (1999).

442 *See id.* at 2207-08.

443 Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820, 861-89 (4th Cir.) (en banc), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999).

444 *See id.* at 883–85.

445 *See id.* at 862-80.

446 *See id.* at 885–86.

447 *See* H.R. CONF. REP. NO. 103-711, at 385 (1994); *see also* S. REP. NO. 103-138, at 55 (1993) ("'[T]he criminal justice system is not providing equal protection of the laws [to] women in the classic sense.'") (quoting statement of Professor Cass Sunstein).

448 *See* S. REP. NO. 102-197, at 43-44 (1991) (citing gender bias task force studies); *see also, e.g.*, S. REP. NO. 103-138, at 45–47, 49 (1993) (describing "overwhelming evidence" of gender bias against women in the state courts and citing gender bias task force studies).

449 *See, e.g.*, S. REP. NO. 103-138, at 42 (1993); 1991 S REP. NO. 102-197, at 34 (1991).

these practices stem from state actors' invidious stereotypes about women,[450] a form of sex discrimination that has long been recognized as violative of the Equal Protection Clause.[451]

This record of pervasive Equal Protection violations supports Congress's section 5 power to enact preventive or remedial legislation, including legislation providing a cause of action against private actors. Contrary to the Fourth Circuit's assertion,[452] the Supreme Court has never held that Congress is barred from regulating private conduct in order to provide a remedy for unconstitutional state action.[453] As the Senate Judiciary Committee concluded in its analysis of section 5's application to VAWA, "While the 14th amendment itself only covers actions by the States, Congress's power to enforce the amendment includes the power to create a private remedy as the most effective means to fight public discrimination."[454] *Boerne*, with its clear statement that Congress's powers under section 5 extend beyond the range of conduct that would violate section 1, does not foreclose this possibility.[455]

Relying on *Boerne*, the Brzonkala court found that the civil rights remedy lacks the requisite congruence and proportionality between the means employed and the end sought to be achieved, because permitting civil actions against individual perpetrators of gender-motivated violent crimes is not calculated to remedy the discriminatory practices of the states.[456] On the contrary, the civil rights remedy is part of a comprehensive legislative initiative that also includes measures aimed directly at improving states' performance in cases of violence against women.[457] The civil rights measure itself is designed to inspire states to

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[450] *See, e.g.*, S. REP. NO. 103-138, at 38 (1993) (describing "archaic prejudices" against women among "those within the justice system.").

[451] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531-46, 550 (1996); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 135-42 (1994); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724-26 (1982).

[452] Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820, 862 (4th Cir.) (en banc), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999).

[453] *See, e.g.*, District of Columbia v. Carter, 409 U.S. 418, 423 n.8 (1973); United States v. Guest, 383 U.S. 745, 762 (1966) (Clark, J., concurring); *id.* at 782 (Brennan, J., dissenting).

[454] S. REP. NO. 103-138, at 55 n.72 (1993) (citing Katzenbach v. Morgan, 384 U.S. 641 (1996) and *Carter*, 409 U.S. 418).

[455] *See* City of Boerne v. Flores, 521 U.S. 507, 517-18 (1997).

[456] *See Brzonkala*, 169 F.3d at 885–86.

[457] *See supra* Part I. The *Brzonkala* court claimed that the provisions in VAWA granting federal funds to the states indicate that Congress could not have been truly concerned about the states' discriminatory practices when in enacted the civil rights remedy. *See Brzonkala*, 169 F.3d at 886. On the contrary, there is nothing inconsistent about Congress attempting to address the problem of discrimination in state legal systems both by providing grants to help states improve their performance and by declaring that perpetrators of gender-motivated

place a high priority on these crimes.[458] The fact that VAWA creates a civil rights cause of action against individuals, not against states, is a strength rather than a weakness of the legislation. Permitting victims of gender-motivated crime to sue the states could deplete the state resources available to fight such crimes and would be more intrusive into state authority. A remedy against the states might also clash with the principles underlying prosecutorial, judicial, and sovereign immunity. VAWA's remedy is narrowly drawn and well matched to the goal Congress sought to achieve.[459]

In finding VAWA's civil rights remedy invalid under section 5 of the Fourteenth Amendment, the *Brzonkala* court repeatedly described acts of gender-motivated violence as "private."[460] This description reveals the court's failure to appreciate the public nature of gender-motivated violence. Although it is usually committed by private actors rather than state actors, gender-motivated violence nevertheless is sufficiently connected to the public sphere of the state so as to bring it within the scope of Congress's legislative power under section 5 of the Fourteenth Amendment. Both causes and effects of gender-motivated violence are located in the public sphere.

As the legislative history of VAWA demonstrated, inadequate and discriminatory state legal systems are among the causes of gender-motivated violence. State action is present in the adoption and enforcement of marital rape exemptions and intrafamily tort immunities that expressly permit men to rape and batter their wives. State action is also present when evidentiary rules and standard jury instructions subject rape victims to suspicion not cast on victims of other crimes.[461] It is present, too, when judges and prosecutors engage in openly discriminatory behavior against female victims of violent crime.[462] These instances of state action, and others like them, have an effect on private actors

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violence violate their victims' federal civil rights.

458 *See 1991 Senate Hearing, supra* note 250, at 156 (statement of Gill Freeman, Chair, Florida Supreme Court Gender Bias Study Implementation Commission, stating that civil rights remedy will "by its very existence, increase the responsiveness of the states").

459 In *Florida Prepaid Secondary Education Expense Board*, the Supreme Court noted with disapproval that the Patent Remedy Act would expose states to "expansive liability" for "[a]n unlimited range of state conduct." Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank, 119 S. Ct. 2199, 2210 (1999). Similarly, in *Boerne*, the Court criticized RFRA's "[s]weeping coverage ensur[ing] its intrusion at every level of government." *See Boerne*, 521 U.S. at 532. By comparison, VAWA's narrowly-drawn remedy, which requires proof of gender motivation in each case, is far more similar to the antidiscrimination measures in the Voting Rights Act, which were explicitly approved by the Court in *Boerne*. *See id.* at 532-33.

460 *See Brzonkala*, 169 F.3d at 826, 853, 862, 874, 889.

461 *See* S. REP. NO. 103-138, at 55 (1993); S. REP. NO. 102-197, at 44–46 (1991).

462 *See* S. REP. NO. 103-138, at 45–47, 49 (1993); S. REP. NO. 102-197, at 34, 43 (1991).

who commit crimes of gender-motivated violence. The policies and practices of the legal system facilitate acts of violence by private individuals by reassuring them that conviction and punishment are impossible or unlikely and by conveying the message that violence against women is acceptable.[463] What sets these policies and practices apart from other instances of state failure to prevent or redress crimes is that the states have engaged in sex discrimination by singling out crimes that primarily affect women for an indifferent or hostile response. The sex-discriminatory practices of the states facilitate the sex-discriminatory practices of individuals who perpetrate gender-motivated crimes. This intermingling of state and private discrimination is sufficient to authorize congressional action under section 5 of the Fourteenth Amendment.[464]

Just as the roots of gender-motivated violence can be found in the public sphere, so can its effects. Many victims and observers have noted that victims of rape and domestic violence are often revictimized by their discriminatory treatment at the hands of police, prosecutors, and judges.[465] State actors are thus responsible for exacerbating the harm inflicted by the violence itself.[466]

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[463] On the relationship between inadequate legal sanctions and men's propensity to commit violence against women, see, e.g., NATIONAL JUDICIAL EDUC. PROGRAM TO PROMOTE EQUALITY FOR WOMEN & MEN IN THE COURTS, UNDERSTANDING SEXUAL VIOLENCE: THE JUDICIAL RESPONSE TO STRANGER AND NON-STRANGER RAPE AND SEXUAL ASSAULT III-35 to III-36 (1994) (providing anecdotal evidence that tendency to commit date rape is reduced when men perceive that serious sanctions will ensue); Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3 (1999) (discussing effect of mandatory arrest and no-drop policies); Joan Zorza, *Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies*, 28 New Eng. L. Rev. 929 (1994) (analyzing studies of effect of arrest on batterers' recidivism rates); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 46 (1992) (same). At the very least, the failure to convict and incarcerate serial rapists and batterers because of gender bias leaves them free to strike again. *See 1990 Senate Hearing*, *supra* note 244, at 64 (statement of Helen Neuborne, Executive Director, NOW Legal Defense and Education Fund, describing case of accused rapist who was acquitted by jurors who felt that the way the victim was dressed showed that she was "asking for" the attack; defendant was later convicted of a different rape).

[464] *See, e.g.*, United States v. Guest, 383 U.S. 745, 755–56 (1966); *see also 1993 House Hearing*, *supra* note 67, at 67 (statement of Professor Cass Sunstein, University of Chicago Law School, stating that "there is far clearer state involvement here than in *Guest* itself, which found sufficient involvement solely on the basis of false private reports of criminal activity that had been given to police officers").

[465] *See, e.g.*, *1991 Senate Hearing*, *supra* note 250, at 148-49 (statement of Gill Freeman, Chair, Florida Supreme Court Gender Bias Study Implementation Commission).

[466] *See* Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1671 (1990) ("When clerks in a local court harass a woman who applies for a restraining order against the violence in her home, they are part of the violence.").

Moreover, as noted earlier, gender-motivated violence reduces women to second-class citizenship.[467] Both women who have personally experienced gender-motivated violence, and those who are fearful that they may experience it, suffer from sharply reduced opportunities for social, economic, and political activity.[468] As a group-based denial of equality, rather than merely a personal injury, gender-motivated violence has an impact on the nation as a whole. It is "an assault on a publicly shared ideal of equality."[469] By characterizing gender-motivated violence as "private," the *Brzonkala* opinion ignores the substantial public effects of such violence.[470]

4. *The Federalism Issue*

Concerns about federalism are prominently featured throughout the *Brzonkala* opinion. The opinion's opening paragraphs are a paean to "the principles of limited federal government upon which this Nation is founded."[471] The court repeatedly emphasized that it was invalidating VAWA's civil rights remedy because to do otherwise would obliterate the distinction between federal and state government.[472] According to the court, if the civil rights remedy is constitutionally permissible, "then Congress could circumvent the constitutional

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[467] *See supra* Parts II, IV.A.

[468] *See* S. REP. NO. 102-197, at 38 (1991) ("The cost of violence against women must be measured not only in the lives scarred or lost by the violence itself, but the lives left unfulfilled because of the fear of violence.... This fear takes a substantial toll on the lives of all women, in lost work, social, and even leisure opportunities.").

[469] *See* S. REP. NO. 101-545, at 43 (1990) (citing testimony of Helen Neuborne).

[470] Of course, all crimes have some effect on society, but gender-motivated crimes, because of their discriminatory element, directly implicate the equal protection concerns of the Fourteenth Amendment.

[471] Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820, 826 (4th Cir.) (en banc), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999).

[472] *See id.* at 838 (stating that upholding VAWA would "convert the power to regulate interstate commerce into a general police power"); *id.* at 843 (cautioning that if VAWA is found constitutional under the Commerce Clause, "essentially limitless congressional... would follow"); *id.* at 844 (stating that accepting the reasoning advanced in support of VAWA would "support a power in the Congress that is, for all intents and purposes, without limit"); *id.* at 852 (claiming that upholding VAWA under the Commerce Clause would "grant[ ] Congress an unlimited police power inconsistent with a Constitution of enumerated and limited federal powers"); *id.* at 888 (stating that if VAWA is valid under section 5 of the Fourteenth Amendment, "then in effect the federal government could constitutionally regulate every aspect of society, even including those areas traditionally thought to be reserved exclusively to the several States....").

limits on federal power imposed by both the Commerce Clause and the Fourteenth Amendment . . . and claim a general police power. . . ."[473]

This slippery slope argument is crucial to the court's reasoning, yet it relies on a highly distorted view of VAWA's civil rights remedy. The distortion arises from the fact that the court has characterized violence against women as purely "private" in terms of both the market-family dichotomy and the state-civil society dichotomy.[474] From this point of view, it is natural to conclude, as the court did, that upholding VAWA would be equivalent to granting Congress "a plenary power over every aspect of human affairs—no matter how private, no matter how local, no matter how remote from commerce."[475] If, however, one takes into account the numerous public aspects of gender-motivated violence—its substantial effect on interstate commerce; its role as an impediment to women's equal employment opportunity; the states' failure to enact and enforce laws that respond to such violence adequately and evenhandedly; the fact that gender-motivated violence discriminates based on membership in a disadvantaged social group and relegates all members of that group to a form of second-class citizenship—it becomes apparent that the civil rights remedy does not represent a breakdown of the distinction between federal and state jurisdiction. Rather, federal jurisdiction is warranted by the significant links between gender-motivated violence and the public spheres of the market and the state.

The fact that VAWA is an antidiscrimination measure is particularly significant in meeting the *Brzonkala* court's federalism concerns. For example, in the course of its Commerce Clause analysis, the court claimed that the justifications for VAWA are indistinguishable from the "national productivity" and "costs of crime" arguments that the United States advanced unsuccessfully in its defense of the Gun-Free School Zones Act in *Lopez*.[476] Those arguments, according to both *Lopez* and *Brzonkala*, would support allowing Congress to wrest the entire field of criminal law from the states. However, the impact of gender-motivated violence is distinct from the impact of crime in general. The discrimination which is at the heart of the conduct prohibited by VAWA provides a unique justification for federal intervention—a justification not present if Congress were to pass a generic national criminal code.[477]

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[473] *Id.* at 853.

[474] *See supra* Parts V.B.2 and V.B.3.

[475] *Brzonkala*, 169 F.3d at 889.

[476] *See id.* at 838–39 (quoting *Lopez*, 514 U.S. at 563–64).

[477] The same argument applies to the trial court's claim that allowing Congress to legislate against gender-motivated violence would necessarily allow Congress to do so with respect to the economic effects of insomnia. *See* Brzonkala v. Virginia Polytechnic & State University, 935 F. Supp. 779, 792–93 (W.D. Va. 1996), *rev'd*, 132 F.3d 949 (4th Cir. 1997),

Additionally, the remedy chosen by Congress is tailored specifically to respond to the discriminatory aspect of gender-motivated violence. Congress did not attempt to pass a substantive national law of rape and domestic violence under the purported authority of the Commerce Clause and section 5 of the Fourteenth Amendment. Rather, it crafted a civil rights remedy.[478]

In fact, there is no inherent conflict between recognizing violence against women as a federal civil rights violation and respecting the restrictions on congressional power imposed by the Constitution. Although federal civil rights law traditionally ignored violence against women, it did so not as a matter of constitutional necessity, but rather as a result of deeply ingrained intellectual and cultural attitudes toward private and public spheres. Those same attitudes animate the *Brzonkala* opinion, causing the court to exaggerate the private aspects of gender-motivated violence and overlook the public ones.

VI. CONCLUSION

Violence against women has historically been considered "private" and therefore beneath the notice of the law. Even after states began to acknowledge the need for improved civil and criminal remedies for violence against women, federal civil rights relief to remedy the discriminatory element of gender-motivated violence remained lacking. When the Violence Against Women Act's civil rights remedy was introduced in 1990, it was a direct challenge to the view that violence against women belongs exclusively to the private sphere. Consistent with the work of feminist scholars who have identified violence against women as a form of sex discrimination, VAWA's civil rights provision declares gender-motivated violence to be a public injury, deserving a public remedy.

When VAWA was under consideration in Congress, it faced outspoken opposition by the federal and state judiciaries, who perceived correctly that the civil rights provision sought to bring about a change in traditional interpretations of public and private. The resistance to VAWA was premised on the very assumptions and stereotypes that the legislation sought to overcome: That all cases involving women involve the family; that family matters should remain

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vacated and reh'g en banc granted (Feb. 5, 1998), *aff'd*, 169 F.3d 820 (4th Cir.) (en banc), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999).

[478] By way of analogy, Congress has been found to be authorized to enact civil rights legislation prohibiting discrimination by restaurants and hotels. *See* Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). However, it does not necessarily follow that Congress is thereby authorized to usurp local control over other matters affecting restaurants and hotels, such as health codes, fire codes, and zoning laws.

private; that federal civil rights exist only to protect individuals from the state, not from each other; and that cases involving the family have no place in federal court. All of these arguments can be traced to the tendency to associate women with the private sphere in all its forms—the sphere of the domestic, the sphere of legal nonintervention, the sphere of civil society, and the sphere of state courts.

When VAWA was passed, it signaled a dramatic transformation in the law's response to violence against women. For the first time, federal law has declared crimes of violence motivated by gender to be a violation of the victim's civil rights. But since VAWA was enacted, it has been under repeated attack and now faces a Supreme Court challenge to its constitutionality. These constitutional challenges reflect the classic dichotomies between the market and the family and between the state and civil society—the very dichotomies that had ensured that violence against women had remained for so long invisible in the law, particularly in federal law. The argument that VAWA's civil rights remedy is unconstitutional rests on the claim that gender-motivated violence is insufficiently connected to the market to warrant congressional action under the Commerce Clause and insufficiently connected to the state to warrant action under section 5 of the Fourteenth Amendment.

The majority of courts to address these constitutional claims have properly rejected them and have concluded that the civil rights remedy was a legitimate exercise of Congress's legislative powers. However, in the case of *Brzonkala v. Virginia Polytechnic Institute & State University*, the judiciary's adherence to traditional conceptions of privacy has resurfaced. In that case, the Fourth Circuit's en banc opinion disregarded overwhelming evidence that gender-motivated violence substantially affects interstate commerce and that such violence is the subject of widespread discriminatory policies and practices by state actors. The court did not credit this evidence of the public aspects of gender-motivated violence but rather clung firmly to the long-accepted view that violence against women is inherently and exclusively private.

The *Brzonkala* opinion portrays VAWA's civil rights remedy as irreconcilable with a federal government of limited powers. If gender-motivated violence were indeed purely private with respect to the distinctions between the family and the market and between the state and civil society, this would be true, for the Constitution embodies these distinctions in the Commerce Clause and the Fourteenth Amendment, respectively. However, gender-motivated violence is not purely private. Its public aspects include its massive effects on interstate commerce; its role in preventing women from participating in commerce as equals to men; its relationship to inadequate and discriminatory state laws and legal systems; and its destructive effect on women's claims to social and political equality. The public aspects of gender-motivated violence are more than

sufficient to meet the requirements for congressional action under the Commerce Clause and section 5 of the Fourteenth Amendment.

And yet, it is important to acknowledge that in many respects, gender-motivated violence *is* private when viewed through the lens of the classic public-private dichotomies. It is usually committed within families or other personal relationships, by private actors rather than state actors. Acknowledging the private aspects of gender-motivated violence is crucial both to reflect women's actual experience of violence and to understand the depth of the resistance to including gender-motivated violence in federal civil rights law. It is precisely because violence against women falls into the categories that have for so long epitomized the private that VAWA was so hard to pass and now faces such a serious challenge in the courts. Indeed, if gender-motivated violence were not private to a significant degree, there would have been less need to pass a new federal civil rights law to combat it. Many acts of gender-motivated violence in the market sphere were already covered by Title VII, and many such acts in the public sphere of the state would violate the Equal Protection Clause of the Constitution or existing civil rights laws.

An accurate view of gender-motivated violence requires the acknowledgment that it has both private and public aspects. Although it was historically conceived as purely private, violence against women in fact straddles the categories of public and private as they have been traditionally defined. The Violence Against Women Act's civil rights remedy recognizes the hybrid nature of gender-motivated violence by creating a remedy against private individuals that is anchored in Congress's constitutional powers to regulate interstate commerce and to enforce the equality protections of the Fourteenth Amendment. It now remains to be seen whether the Supreme Court will adopt a conception of public and private that is sufficiently nuanced to recognize the extent to which gender-motivated violence spans the two categories.

Contrary to the claims of its detractors, upholding VAWA would not result in eliminating the distinctions between public and private, between the market and the family, between the state and civil society, and between federal and state government. Rather, it would simply recognize the extent to which gender-motivated violence partakes of the public sphere, as envisioned by each of those dichotomies, and therefore deserves public recognition and public response.

Judicial adherence to the familiar stereotype of violence against women as quintessentially private has proven to be persistent, but it should not be allowed to prevail. If the Violence Against Women Act's civil rights remedy is ultimately found unconstitutional, the result will be to obscure the public significance of gender-motivated violence and deny an effective legal remedy to its victims.